Office of the Chairman
Administrative Conference of the United States

Administrative Conference of the United States

Recommendations and Reports

1982

Volume II

Administrative Conference of the United States

The Administrative Conference of the United States was established by statute as an independent agency of the federal government in 1964. Its purpose is to promote improvements in the efficiency, adequacy and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions.

To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished through direct action on the part of the affected agencies or legislative changes.

RECEIVED
OCT 22 1984
ADMINISTRATIVE CONFERENCE
LIBRARY

Administrative Conference of the United States

Recommendations and Reports

1982

Volume II

CONTENTS

Vol. Page

RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES:

Recommendation 82–1: Exemption (b)(4) of the Freedom of Information Act .... I 1
Recommendation 82–2: Resolving Disputes Under Federal Grant Programs .... I 9
Recommendation 82–3: Federal Venue Provisions Applicable to Suits Against the Government .... I 15
Recommendation 82–4: Procedures for Negotiating Proposed Regulations .... I 21
Recommendation 82–5: Federal Regulation of Cancer-Causing Chemicals .... II 1
Recommendation 82–6: Federal Officials' Liability for Constitutional Violations .... II 13
Recommendation 82–7: Judicial Review of Rules in Enforcement Proceedings .... II 15

BACKGROUND REPORTS FOR RECOMMENDATIONS 82–1 THROUGH 82–7:

82–1 James T. O'Reilly. Regaining A Confidence: Protection of Business Confidential Data through Reform of the Freedom of Information Act .... I 29
Russell B. Stevenson, Jr. Protecting Business Secrets Under The Freedom of Information Act: Managing Exemption 4 .... I 81
82–2 Ann Steinberg. Federal Grant Dispute Resolution .... I 137
82–3 Schlesinger, Steve R., Editor. Venue at the Crossroads I 219
82–4 Philip J. Harter. Negotiating Regulations: A Cure for Malaise .... I 301
82–5 Richard A. Merrill. Federal Regulation of Cancer Causing Chemicals .... II 21
82–6 Thomas J. Madden & Nicholas W. Allard. Advice on Official Liability and Immunity .... II 201
82–7 Paul R. Verkuil. Congressional Limitations on Judicial Review of Rules: The Jurisprudential Implications .... II 443

STATEMENTS:

Statement on Informal Rulemaking Provisions of the Administrative Procedure Act .... II 486
Statement on Discipline of Attorneys Practicing Before Federal Agencies .... II 487

Vol. Page

Report of the Administrative Conference Committee on Governmental Processes Concerning Discipline of Attorneys Practicing Before Federal Agencies .... II 488

Michael P. Cox. Report on Regulation of Attorneys Practicing Before Federal Agencies .... II 491

SELECTED CONSULTANT REPORT:

Teresa M. Schwartz. The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade .... II 578

RECOMMENDATION 82-5 FEDERAL REGULATION OF CANCER-CAUSING CHEMICALS

(Adopted June 18, 1982)

The following recommendations broadly address the procedures by which federal agencies identify, evaluate, and regulate substances that pose a potential risk of human cancer. For many years these regulatory activities have been among the most controversial engaged in by federal agencies. They implicate important health and economic values and attract the interest of groups throughout society. Some of the issues dealt with in these recommendations are not peculiar to the context of carcinogen regulation. The statutory procedures agencies follow in regulating human exposure to cancer hazards, for example, are applicable to many other environmental and health hazards. While these recommendations may thus have broader application or impact, they are based on an evaluation of agency performance in this context alone.

I. PRIORITY SETTING

Estimates of the number of chemicals that may pose a risk of human cancer describe a universe larger than government agencies can evaluate or regulate. Agency resources for scientific review and regulatory proceedings are shrinking, and the capacity of manufacturers and users of chemicals to implement costly controls is likewise limited. In these circumstances, attention should be concentrated on those chemicals that pose the greatest risks and can be controlled most economically. As agencies have increasingly recognized, accomplishing this objective requires establishment of priorities.

Priority setting should be part of any program directed at determining the health effects of chemicals, as well as of programs designed to establish exposure limits. Each regulatory agency should set its own priorities, but there is also value in interagency selection of candidates for regulation and, particularly, for further testing.

Although candidates for evaluation and regulation should be carefully selected, any ranking based on abstract criteria, however rational, will be vulnerable to new information about human exposure or health effects and to public concerns. Agencies should explain departures from established priorities, but should retain flexibility to respond to new problems.

Criteria for selecting candidates for regulation should include the extent of the hazard posed by a chemical—a function of its potency, the conditions of exposure, and the number of people exposed. The extent of the hazard can often be expressed in quantitiative terms. Agencies should also consider the effectiveness and cost of alternative control measures as well as other effects of regulation. Estimates of the cost-effectiveness of regulating specific chemicals can be helpful in selecting priorities. Because of the complexity of these criteria and the continuing need to obtain additional information, selection of candidates for regulation will often be an iterative process.

Priority setting should be a public process which affords interested persons an opportunity to communicate their own views to the agency. Varied techniques exist short of rulemaking under the Administrative Procedure Act for providing such opportunities, including public meetings, use of expert advisory panels, and publication in the Federal Register of invitations to submit data and views. Under whatever system, preliminary rankings risk being misinterpreted as definitive judgments about the hazards of chemicals before manufacturers and users have had an opportunity to present evidence or arguments. Accordingly, agency announcements of priorities should make clear the tentative character of underlying scientific assessments and describe the opportunities for interested persons to supply contrary or confirmatory information.

RECOMMENDATION

1. To the extent compatible with other demands on their resources, agencies should establish and follow systems for ranking chemicals as candidates for scientific evaluation or regulation. Agencies should generally adhere to the priorities thus established, but must retain the flexibility to respond to new hazards or to public concerns about other chemicals.

2. Priority setting should be part of selecting chemicals (a) for further testing, (b) for intensive scientific and regulatory evaluation, and (c) for administrative action to limit or eliminate exposure.

3. To the extent allowed by law, priorities should be set by agencies with the objective of maximizing the net benefits to society of agency action. Thus, in setting priorities, the agency should consider the expected benefits and costs of various alternatives. Although the criteria for selecting chemicals for regulation should take account of the health hazards posed by chemicals, including the potency of the chemicals, levels of exposure, the number of people likely to be exposed, and the costs and cost-effectiveness of methods for controlling exposure, to the extent that these may be known.

4. Because agencies differ in their functions and their selection of candidates for evaluation and regulation must be coordinated with other agency programs, each agency should establish its own priorities. The several agencies responsible for regulating carcinogens should, however, periodically compare their rankings and, where feasible, coordinate their testing, evaluation, and regulatory efforts. Consultation with scientific, industrial, and public interest organizations should be encouraged.

5. Agency procedures for setting priorities should permit interested members of the public to submit information and views concerning specific candidates. Agencies should consider adopting priority-setting systems through rulemaking, but more informal methods are appropriate for ranking individual chemicals for

evaluation and regulation. Any agency announcement that a product or chemical is a candidate for further evaluation or for regulation should explain both the bases of that assessment and its preliminary nature and should describe available procedures for confirming or negating its preliminary conclusions.

II. INTERAGENCY COORDINATION

Responsibility for regulating chemicals that pose a risk of human cancer is shared by several agencies, including most notably the Environmental Protection Agency (EPA), Occupational Safety and Health Administration (OSHA), Food and Drug Administration (FDA), and Consumer Product Safety Commission (CPSC). Only in recent years have these agencies attempted to coordinate their activities to assure consistency and enhance the benefits of regulation. While the agencies' criteria for identifying and evaluating potential carcinogens have in fact not been conflicting, their decisions have sometimes appeared difficult to reconcile, usually because of differences in legislation.

The creation of the Interagency Regulatory Liaison Group in 1977 rested on the premises that federal regulation of chemical carcinogens should proceed from common principles of scientific evaluation and should be coordinated administratively. While these premises remain valid, other mechanisms may be equally effective in assuring coordination. Opportunities for productive coordination exist in several areas: establishment of government-wide principles of scientific evaluation; agreement on test guidelines for toxicological experiments and other studies of health effects; ranking of chemicals for testing; and monitoring and enforcement of exposure controls.

The four agencies have on several recent occasions cooperated in the regulation of specific chemicals. They once assembled a central scientific working group to evaluate formaldehyde, a chemical of common interest, and they agreed on a common list of chemicals that were high priorities for coordinated regulation. Though diverse statutory procedures have sometimes discouraged joint administrative proceedings, opportunities at the preproposal stage for cooperation in evaluating health effects and performing economic analysis have not yet been fully exploited.

RECOMMENDATION

1. Interagency coordination in identifying, evaluating, and regulating potential human carcinogens should be encouraged. Effective coordination can reduce governmental costs, minimize inconsistency among the agencies, and better illuminate the economic costs of alternative control options.

2. Agencies should continue to cooperate in identifying chemicals for which further testing is needed to permit regulatory assessments. The National Toxicology Program should continue to elicit joint agency rankings of candidates for testing.

3. Regulatory agencies should collaborate with government scientific bodies, including the National Toxicology Program, National Institute of Environmental Health Sciences, and National Center for Toxicological Research, to obtain agreement on guidelines for the conduct and evaluation of toxicological

tests. This effort need not result in public rulemaking to adopt test protocols, but scientists outside government should have an opportunity to contribute to the development of test guidelines. Cooperative guidelines should also be considered for short term tests and epidemiological studies, but current guidelines should not discourage development of improved test methods.

4. To the extent permitted by statute, agencies responsible for regulating carcinogens should adhere to common criteria for evaluating and interpreting health effects data. Agencies should avoid inconsistency in their approaches to mixed scientific-policy issues, such as whether to assume a no-threshold model of carcinogenesis, whether to perform quantitative estimates of human risk, or whether to allow evidence that a chemical produces an increase in cancer in laboratory animals through mechanisms that do not suggest human risk.

5. Agencies responsible for regulating carcinogens should continue to explore joint evaluation of the potential health hazards of chemicals that are candidates for regulation by more than one agency, for instance, by use of a multi-agency advisory panel for any particular substance.

6. Agencies should explore other opportunities to collaborate before the initiation of formal administrative proceedings to regulate a chemical. These may include joint development of exposure estimates and joint preparation of economic analyses of alternative regulatory approaches.

7. Agencies should, after eliciting the views of interested persons, consider conducting joint administrative proceedings when they contemplate regulating the same chemical. Statutory diversity may, however, complicate or even preclude such proceedings.

III. CHEMICAL SELECTION AND GUIDELINES FOR TESTING AND EVALUATION

The selection of chemicals for study, the design of protocols for laboratory experiments, and the establishment of criteria for interpreting study results are important parts of the process for regulating substances that pose a risk of human cancer. These are essentially scientific functions which should not be dictated by narrow policy considerations. The important desiderata are scientific integrity and consistency.

At the same time, it remains true that much toxicological testing performed in the United States—by government laboratories and by or on behalf of private industry—is performed to aid regulatory decisionmaking. Numerous toxicological studies are performed to support marketing approval for food additives, pesticides, and pharmaceuticals. FDA and EPA have both conducted similar studies on substances within their regulatory jurisdiction. The agencies have also relied on studies commissioned by the National Cancer Institute. The NCI bioassay program has more recently fallen under the supervision of the National Toxicology Program, whose supervisory board includes representatives of the regulatory agencies. NTP currently accepts nominations of chemicals for testing from the agencies.

Under the auspices of the former Interagency Regulatory Liaison Group, the four agencies studied here (EPA, OSHA, FDA, and CPSC) actively sought agreement on joint protocols for toxicological testing and on criteria for evaluation of study results.

RECOMMENDATION

1. In conjunction with the National Toxicology Program and in consultation with scientific organizations outside government, regulatory agencies should continue efforts to develop consistent guidelines for toxicological testing. These test guidelines should reflect current scientific consensus but also awareness of the resource limitations that constrain both government and industry. The guidelines developed or espoused by the agencies should not be issued as formal regulations. Rulemaking would needlessly prolong the process of reaching agreement and formal regulations would limit the ability of agencies, producers, and testing laboratories to design protocols or adapt existing guidelines to new circumstances.
2. Agencies should adhere to similar test guidelines and similar criteria for interpreting test results. Any departure from common standards should be specifically and convincingly justified.
3. The National Toxicology Program should continue to encourage the participation of EPA, OSHA, FDA, and CPSC in its selection of chemicals for testing. It should be willing, on request, to assist agencies in their evaluation of study findings. The NTP special working group to evaluate the carcinogenicity of formaldehyde for all of the four regulatory agencies represents one promising experiment in the effort to assure consistency among the agencies.

IV. ADVISORY PANELS

Assessment of the health risks posed by chemicals requires substantial information about their toxicity and about the conditions under which humans are exposed to them, as well as understanding of the techniques for obtaining such information. Techniques for toxicological evaluation, exposure estimation, and quantitative assessment of human risk increasingly demand state-of-the-art expertise. Evaluation of potential human carcinogens also requires impartiality in assessing the quality and interpreting the results of toxicological and epidemiological studies. In the scientific world, new research findings are customarily exposed to peer review before they become accepted as reliable. Increasingly, regulatory agencies have concluded that the data on which they rely, and the interpretations they give these data, should be subjected to peer review before becoming the bases for regulatory decisions.

Several proposals have recently been advanced to mandate and institutionalize this peer review function. Some of these proposals call for strict separation of risk assessment from the process of evaluating and selecting regulatory options. These proposals raise difficult issues respecting the design of procedures for administrative decisionmaking about chemical carcinogens. The function of assessing risk can be distinguished analytically from the choice of regulatory responses, but separating them in practice is more difficult. The close relationships among issues of toxicity, exposure, and the cost of controls makes the process of agency evaluation an interactive one. Accordingly, mechanisms for exposing agency judgments to peer review should be flexible enough to permit frequent interchange with agency policy makers.

One method that agencies have successfully used for institutionalizing peer review is consultation with expert advisory panels. These panels have taken several forms, ranging from informal working groups of agency scientists assigned to review a single chemical to standing committees of independent experts who advise on numerous candidates for regulation. Advisory panels can contribute objectivity as well as expertise to agency decisions. Their advice has sometimes prevented erroneous regulatory actions; more frequently, their role has been to illuminate complex issues and enhance the quality, and thus the credibility, of agency scientific analysis.

Advisory panels comprised in whole or in part of non-federal employees are governed by the Federal Advisory Committee Act (FACA), unless exempted by specific legislation. The FACA requires individual chartering and biennial reapproval and mandates practices that are designed to assure the balance, openness, and integrity of advisory committees. Most of these requirements are salutary, and the following recommendations endorse their observance by panels even where not formally subject to the FACA. Certain of the Act's provisions, however, have discouraged agencies from seeking outside peer review. The recommendations advanced here are intended to encourage agency resort to expert advisory panels without necessarily endorsing every requirement of the FACA. None of these recommendations should be construed as superseding either that Act, where applicable, or federal conflict of interest laws.

RECOMMENDATION

1. Peer review of experimental findings and scientific judgments is an important means of validating the technical bases of regulatory decisions concerning carcinogens. To the extent compatible with existing law, agencies should structure their decisional processes to incorporate mechanisms for scientific peer review.

2. Expert advisory panels represent one valuable means for obtaining scientific peer review of agency decisions. Advisory panels can provide information that will aid agencies in setting priorities, in evaluating scientific data prior to initiation of administrative proceedings, and in evaluating evidence submitted by interested persons during public proceedings.

3. The design, composition, and operation of an advisory panel should fit the function it is to perform; no uniform approach is optimal. A standing advisory panel, with responsibility for reviewing the scientific bases of major actions by a particular program, can contribute consistency in addition to expertise, and it provides a ready forum for agency consultation. To assure that the panel has access to relevant expertise, sub-units can be appointed to evaluate specific chemicals or issues. An agency that lacks a standing advisory panel, however, should not forgo opportunities to create ad hoc panels to review the scientific bases of contemplated regulatory actions.

4. The role of an expert advisory panel may embrace evaluating data concerning the health effects of chemicals, interpreting those data and characterizing the chemicals' effects, and estimating the likely frequency of those effects under different exposure conditions. When an agency rejects an advisory panel's scientific judgment, it should explain the bases for that rejection. When an agency selects a regulatory approach whose bases appear inconsistent with a panel's advice, it should explain the legal, social, or other reasons that dictate or justify that choice.

5. Members of an expert advisory panel should be selected primarily for their expertise in relevant scientific fields. Qualified scientists, even if employed by the agency they are to advise, by other government agencies, or by commercial organizations, may appropriately be selected to serve on advisory panels. In the selection of panel members, attention should be given to assuring balance in scientific orientation and viewpoint. The organizational affiliations of all panel members should be a matter of public record. The financial holdings and relationships of potential panel members should be carefully screened by the appointing officials and periodically reviewed thereafter to prevent conflicts of interest. If a panel includes members who are not disinterested with respect to a particular substance, those members should not participate in the panel's discussions of that substance.

6. Advisory panels should be accessible for consultation by the appointing agency at frequent intervals and on short notice. Consultation should usually occur before any announcement of a plan to regulate a chemical. Even when the Federal Advisory Committee Act does not apply, many of its requirements represent appropriate guides for the operation of advisory panels. Referrals of issues to advisory panels and meetings of agency officials with panel members should be matters of public record. Advance public notice of panel meetings should be provided where practicable. Panels should meet in open session except when reviewing data that are entitled to confidential treatment or, unless restricted by statute, when the panel members vote to close their deliberations. All panel conclusions and recommendations should be reduced to writing and become a part of the material to be considered in any ensuing administrative proceeding.

7. Advisory panels established to evaluate scientific data for, and provide advice to, more than one agency may often be useful. Such panels can be particularly valuable in recommending chemicals for further study or testing. Where a chemical is of interest to more than one regulatory agency, a single advisory panel may be an efficient way of obtaining an independent assessment of its potential health effects. Interagency panels should be subject to the same restrictions as to composition, operation, and scope of responsibility as panels appointed to serve a single agency.

V. Generic Rulemaking

Agencies responsible for regulating potential carcinogens have attempted to develop and publish criteria for evaluating scientific data that underlie their decisions. These efforts have included informal statements of policy, proposed interpretative regulations, binding substantive standards, and interagency policy statements. The motives underlying these efforts to establish a framework for evaluating evidence concerning individual chemicals have been as diverse as the forms they have taken. One objective has been to obtain agreement among the agencies on the scientific criteria and policies that inform regulation of carcinogens. Another objective has been to improve understanding, among the public and within agency staffs, of the principles that guide agency decisions. Some agencies have also attempted to frame these principles as rules of decision in order to forestall repetitive disputes in proceedings to regulate individual chemicals.

The desirability of assuring agency adherence to common principles of scientific interpretation seems clear. Equally important is conformity of these principles with the best current understanding of the mechanisms of carcinogenesis, of toxicological and epidemiological research, and of qunatitative risk assessment. Attempts to treat decisional guides as though they were binding substantive rules may conflict with the need to remain sensitive to developments in rapidly changing fields.

The efforts of individual agencies to establish criteria for identifying and evaluating potential human carcinogens have been criticized on several counts. In addition to disputing the content of agency judgments, industry critics have questioned the appropriateness of analytic frameworks that discourage individualized assessment of the capacity of chemicals to cause cancer. The duration of agency rulemaking proceedings suggests difficulty in obtaining scientific agreement in this area, but the controversy more often betrays disagreement over agency policy judgments rather than over their distillation of scientific consensus.

RECOMMENDATION

1. In appropriate cases generic rules legitimately may be the basis for summary administrative resolution of recurrent issues, provided they do not foreclose reexamination of scientific conclusions respecting carcinogenicity of particular substances. Agencies should proceed cautiously in using this technique because the complexity and uncertainty of the issues involved and continuing advances in scientific understanding of the mechanisms of human cancer impede development of binding general principles.

2. Agencies should be encouraged to develop systematic statements of the principles that they will apply in identifying, ranking, and evaluating chemicals that may pose a risk of human cancer. The systematizing process should ordinarily involve opportunity for submission of data and views by interested persons outside the agency. Whenever an agency expects to limit argument over principles that will guide decisions in proceedings to regulate individual chemicals, compliance with statutory requirements for rulemaking is essential before the principles are formulated.

3. Agency statements may appropriately address the design and interpretation of scientific studies, the measurement or estimation of human exposure, the performance of quantitative risk assessment, and the selection of regulatory responses. These statements should attempt to distinguish between elements that are intended to summarize current scientific consensus and others that represent

policy judgments reached in the absence of consensus. Policy judgments are an inevitable component of regulatory decisions and, where similar issues arise recurrently, are appropriately resolved on a generic basis. But where scientific developments in the near term are likely to require modification, or where individual studies or chemicals are often likely to deviate from the "norm," they should not be framed as binding rules.

4. Many issues involved in identifying, evaluating and regulating potential carcinogens are common to all agencies and should be resolved consistently. These issues range from the criteria for interpreting scientific studies to the selection of mathematical models for estimating human risk. Though scientific uncertainty surrounding many of these issues requires considerations of value and policy, disparate agency responses should be avoided or convincingly justified.

VI. Quantitative Assessment of Risk

Various pressures and incentives have encouraged regulatory agencies to explore methods for quantifying the risk of potential carcinogens. At the same time the use of quantitative risk assessment in making regulatory decisions has provoked fierce controversy. Industrial interests have generally urged agencies to regard quantification as an essential step in evaluating measures for controlling carcinogens. Consumer groups and labor unions, on the other hand, have cautioned against excessive reliance on techniques whose reliability remains uncertain. The agencies themselves have for some time had difficulty reaching consensus on the issue.

Criticism of quantitative risk assessment stems in part from doubts about its reliability. Reliance on animal models as qualitative predictors of human risk often may be unavoidable, and the further extrapolation from effects observed at high doses to the unmeasurable effects predicted at low doses compounds uncertainty. Critics also point to the wide range of risks at low doses predicted by different extrapolation models. A further criticism is that quantitative risk assessment can too easily be exploited to compute the dollar value implicitly assigned by regulators to human life.

Despite these criticisms, quantitative risk estimation has an appeal for both analysts and decisionmakers. Without some means of describing the magnitude of the health effects associated with exposure to a carcinogen an agency must find some other basis for deciding what controls to require. Legislation sometimes provides an answer. The Delaney Clause, for example, makes quantification of the risk of a carcinogenic food additive superfluous. Under any statute that permits or instructs the agency to weigh the costs against the health consequences of alternative means of controlling exposure, however, a method to quantify risks has proved essential.

Quantitative risk assessment can help illuminate many of the choices that agencies confront in regulating carcinogens. Even with its uncertainties, the technique facilitates comparison of the risks posed by different substances, which can aid in establishing priorities for regulation. Similarly, quantitative risk assessment can illuminate the choice among diverse regulatory options. A common unit of measurement for evaluating the health benefits of different options can materially advance analysis of a multidimensional decision even if the measurements are unverifiable and the benefits are not converted into dollars.

RECOMMENDATION

1. Quantitative risk estimates can be valuable in setting priorities for regulation of carcinogens, comparing the human health consequences of alternative control measures, and in analyzing the costs and benefits of regulatory options. To the extent regulatory statutes allow and available data permit, agencies should attempt to estimate and describe the magnitude of the risk posed by prevailing levels of exposure to substances considered for regulation. Within the same constraints, agencies should also attempt to describe the size of the health benefits provided by measures required to reduce or eliminate human exposure.

2. Given the limitations of techniques for quantitative risk assessment and different statutory criteria for limiting or eliminating exposure, risk estimates ordinarily will be only one consideration. The weight accorded such estimates should reflect:

(a) the statutory criteria governing agency decisions;

(b) the adequacy of available data on carcinogenic potency and on the type, levels, and duration of human exposure; and

(c) the acceptance of the methods used to estimate future health effects.

3. Any description of the magnitude of the risk associated with prevailing exposures or of the estimated health benefits of exposure controls should explicitly identify:

(a) the toxicological, epidemiological, and exposure data on which it rests;

(b) the assumptions underlying any extrapolations from animals to man or from high to low exposure levels;

(c) other assumptions about the behavior of the substance or about the characteristics of human exposure to it; and

(d) the range of uncertainty associated with the estimates.

4. Quantitative estimates of risk associated with exposure to a substance—particularly when expressed in terms of lives likely to be lost or cases of cancer likely to occur—have a power to captivate public and press attention. Such estimates should be accompanied by statements stressing their imprecision and uncertainty. When the available health effects data are seriously deficient or little is known about human exposures to a substance, the risk of misinterpretation may justify an agency decision not to attempt quantitative estimates of risk or health benefits.

VII. PUBLIC PARTICIPATION

Several values are served by public participation in the regulatory process. Perhaps preeminent is the value of fairness to those who may be directly affected by government action. The "right to be heard" before government acts adversely to important private interests is well established in American administrative law.

This is reflected in the Administrative Procedure Act and by most regulatory statutes.

A second purpose served by broad public pariticipation in agency decisionmaking is avoidance of mistaken even though well intentioned judgments that rest on incomplete information. In the context of carcinogen regulation this value enjoys a high rank. Decisions concerning human exposure to potential carcinogens should rest on sound scientific and economic judgments. Estimates of risk and cost require information that agencies often lack, as well as analytical skills that are found in industry and many public interest organizations. Accordingly, agency procedures should facilitate participation by those in the private sector with relevant scientific and economic expertise.

A third important value served by public participation is balance. Agency decisions concerning environmental health hazards require government to take large chances with both human life and private business. Data are invariably inadequate and estimates of future consequences are problematical; these uncertainties simply complicate an already difficult task. Determining the appropriate level of human exposure to a substance reasonably found to cause cancer is fundamentally a normative exercise in which there are no experts. Because decisions are left to regulators with sometimes scant Congressional guidance, agency procedures should facilitate broad participation and vigorous debate to assure agency understanding of diverse viewpoints.

Finally, the opportunity to influence agency thinking, coupled with an awareness that agency procedures permit broad participation, contributes to the acceptability of agency decisions.

Public health or scientific interests may not have participated in the regulatory process on equal footing with commercial interests. The extent to which this disparity, if it exists, is a function of lack of resources and whether it should be addressed through public funding of citizen participation are questions that transcend carcinogen regulation. The arguments for and against funding should be considered in the broader context.

Recommendation

1. In setting exposure limits for carcinogens, agencies ordinarily should follow procedures that assure opportunities for all affected interests, commercial and non-commercial alike, to submit information and views before final decisions are reached. Procedures may appropriately vary with the requirements of agency organic statutes, with the characteristics of the activity or products whose regulation is contemplated, and with the need for prompt action to limit exposure.

2. Agencies should encourage and facilitate the participation of independent experts in toxicology, epidemiology, risk and exposure estimation, and other relevant technical disciplines. A useful way of elicitng participation in the regulatory process by independent scientists is through the use of standing or ad hoc advisory panels.

3. Congress should refrain from imposing procedural requirements, such as section 701(e) of the Federal Food, Drug, and Cosmetic Act, which are so burdensome that agencies search for regulatory approaches that have the effect

of precluding effective participation in their decisionmaking processes by affected interests.*

---

* See also Administrative Conference Recommendation 71-7 (Rulemaking on a Record by the Food and Drug Administration), 2 ACUS Recommendations and Reports 42 (1973); and Recommendation 72-5 (Procedures for the Adoption of Rules of General Applicability), 2 ACUS Recommendations and Reports 66 (1973), 1 C.F.R. §305.72-5.

RECOMMENDATION 82-6
FEDERAL OFFICIALS' LIABILITY FOR CONSTITUTIONAL VIOLATIONS

(Adopted December 16, 1982)

This recommendation focuses on the increasing risk to federal executive branch officials of civil liability for monetary damages for alleged violations of federal constitutional rights. This vulnerability has expanded dramatically in recent years, as a result of judicially-discovered rights enunciated in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and subsequent court cases involving allegations of official misconduct. Under the present system of officials' liability, as developed piecemeal by the courts, an individual federal employee (except certain categories of officials, including the President, who have been ruled to have absolute immunity) may be held personally liable for acts that, though committed while the employee was acting within the scope of office or employment, may subsequently be found to violate a constitutional provision. Juries may hold officials liable for actual damages where they cannot show that their actions were taken in good faith—that is, in the belief that their conduct was lawful—and for punitive damages where they are shown to have acted maliciously or with reckless disregard of the plaintiff's constitutional rights. At present, damages may not be recovered against the United States for violations of constitutional rights as such, although claims arising out of the same conduct may or may not be stated against the Government under the Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680.

The existing system of civil sanctions for constitutional violations by federal officials does not provide adequate assurance of compensation for victims of such violations and discourages proper conduct by government officials. In addition, the federal government often has interests at stake in constitutional tort litigation involving its officials which may not be represented adequately when individual officials themselves are the defendants on trial.

In *Carlson v. Green*, 446 U.S. 14 (1980), the Supreme Court suggested that the courts may properly refuse to entertain monetary damage actions against federal officials if Congress has expressly substituted a different remedy or made available an alternative to the *Bivens* remedy. In the Conference's view, such an alternative system is likely to improve the effectiveness with which federal programs and laws are administered.

To serve the primary goals of compensation, deterrence, and fairness in dealing with constitutional violations assertedly committed by federal officials, and to afford a solution to the problems perceived to flow from the current system of individual liability, Congress should replace the existing system by accepting public liability for wrongs done in the public's name and by strengthening the means of dealing with the wrongdoers. When defending against constitutional tort claims, the Government should be able to assert any immunity or good faith defense available to the officials.

Since the Conference's mandate extends only to matters affecting the administration of federal agencies' programs, this recommendation addresses only actions against executive agency officials. We do not intend to suggest that the same considerations do not apply to officials of the legislative and judicial branches.

Recommendation

1. Congress should enact legislation providing that the United States shall be substituted as the exclusive party defendant in all actions for damages for violations of rights secured by the Constitution of the United States committed by federal executive branch officers and employees while acting within the scope of their office or employment. The legislation should provide adequate procedures to ensure that, where a damage action for violation of such rights is brought against an executive branch officer or employee, such action should be deemed to have been brought against the United States upon certification by the Attorney General that the defendant officer or employee was acting within the scope of his office or employment at the time of the incident out of which the suit arose. The Attorney General's failure to make such certification should be judicially reviewable.

2. Such legislation should provide that, in actions alleging constitutional violations, the United States may assert as a defense any qualified immunity or good faith defense available to the executive branch officer or employee whose conduct gave rise to the claim, or his reasonable good faith belief in the lawfulness of his conduct. The United States should also be free to assert such other defenses as may be available, including the absolute immunity of those officers entitled to such immunity.

3. The agency that employed the offending official should be responsible for investigation and, where appropriate, for disciplining the official and implementing any other appropriate corrective measures. The Office of Personnel Management should assure, via guidance promulgated through the Federal Personnel Manual and other devices, that agencies are authorized to employ existing mechanisms to impose sanctions on officers and employees who have violated the constitutional rights of any person. Employees should be permitted to assert as a defense in any disciplinary proceeding their good faith in taking the action in question, as well as such other defenses as may be available.

4. Congressional legislation should preserve the opportunity for jury trial only with respect to claims that arose prior to the effective date of the legislation implementing this recommendation.

RECOMMENDATION 82-7
JUDICIAL REVIEW OF RULES IN ENFORCEMENT PROCEEDINGS

(Adopted December 17, 1982)

A person adversely affected by an agency rule may ordinarily obtain judicial review of that rule either by instituting a direct review proceeding against the agency in an appropriate court (pre-enforcement review)[1] or by asserting the invalidity of the rule as a defense in a civil or criminal proceeding to apply or enforce the rule (enforcement review). Prior to the Supreme Court's decision in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), direct review was generally difficult to obtain because of technical defenses such as lack of ripeness or lack of standing, and most review of rules took place in the context of enforcement proceedings.

Under *Abbott Laboratories* and subsequent decisions, direct review of agency rules has become increasingly available. Congress in much recent regulatory legislation has specifically provided for immediate resort to judicial review at the conclusion of the rulemaking proceeding. As a result, direct judicial review of rules has come to be regarded as the norm and review in an enforcement proceeding is less common. In a number of statutes, in fact, Congress has sought to encourage prompt direct review by explicitly precluding or limiting the availability of review at the enforcement stage.

At the same time, and perhaps largely as a result of the increasing importance of direct judicial review of rules, courts have intensified their scrutiny of the administrative process preceding promulgation of the rule. Whereas in the pre-*Abbott Laboratories* era challenges to rules were most frequently based on assertions of lack of agency authority or on inapplicability of the rule to the party's particular circumstances, today the issues in direct review proceedings increasingly include whether the agency made the proper procedural choices in the rulemaking proceeding and whether the rule finds adequate support in the administrative record.

The Administrative Procedure Act does not by its terms establish different standards of review for direct review proceedings and enforcement proceedings, and few courts have considered the implications for review in enforcement proceedings of the increasingly intensive standard developed in direct review proceedings. Moreover, in adopting statutory provisions precluding enforcement review Congress has not distinguished between these process-related objections and other types of objections to rules.

---

[1] We use the term ''direct review'' to refer to judicial review of a rule of general applicability before the rule is applied to a particular person in an adjudicative proceeding. Such review may be by the court of appeals pursuant to a special statutory review procedure or by the district court in the exercise of its power under the Administrative Procedure Act to review agency action not otherwise reviewable. See ACUS Recommendations 74-4 (Preenforcement Judicial Review of Rules of General Applicability) and 75-3 (The Choice of Forum for Judicial Review of Administrative Action).

In Recommendation 76-4, the Conference criticized provisions precluding enforcement review in the Clean Air Act and the Federal Water Pollution Control Act. In view of the increasing reliance on direct review and the proliferation of issues concerning the adequacy of the rulemaking process rather than the agency's authority to promulgate a particular rule, however, the Conference now believes that limitations on judicial review of rules in enforcement proceedings may sometimes be appropriate. The purpose of this recommendation is twofold: to identify factors that Congress should consider in deciding whether to preclude enforcement judicial review, and to distinguish between types of challenges to rules that should ordinarily be covered by any preclusion provisions Congress decides to adopt and types of issues that should ordinarily remain available in enforcement proceedings even where preclusion provisions have been adopted.

Sound principles of administrative law favor prompt and dispositive resolution of disputed issues arising from an administrative rulemaking proceeding. Direct review in the court of appeals is more likely to afford such a resolution than later enforcement review in one or more district courts.[2] The uncertainty caused by the potential for conflicting court decisions and by the possibility that a rule may be overturned several years after its promulgation can be extremely disruptive of the regulatory scheme. In addition, reopening a rulemaking proceeding to correct any defects will become increasingly difficult as the original record grows stale over time and the situation of the interested parties changes.

On the other hand, those affected by a rule should have a full and fair opportunity to challenge the rule on all available grounds. These interests must be balanced in determining when limitations on enforcement review of rules were appropriate. The balance will tip in favor of limitations on enforcement review when the impact of foreclosing review on those affected by a rule is the least and when the costs of regulatory uncertainty or of declaring a rule invalid after several years are the greatest. Thus one factor favoring limitations on enforcement review is the likelihood that the groups affected by rules promulgated under a particular statute will be well represented in the agency rulemaking proceeding because, for example, those groups are well defined and/or well organized. Widespread participation in the rulemaking proceeding reduces the probability that any significant issue concerning the rule, particularly one pertaining to the rulemaking process itself, will be overlooked on direct review.

The likelihood that a rulemaking proceeding will involve complex procedures or intensive factual exploration also militates in favor of limits on enforcement review. The more elaborate and formal the administrative rulemaking proceeding (such as those required by hybrid rulemaking statutes[3]), the more likely it is that the rule will be subject to challenge on the basis of a relatively narrow issue involving the procedures used or the record support for some aspect of the rule. As time passes, reopening such a complex proceeding after a court reversal will be increasingly burdensome. Encouraging the dispositive resolution of challenges to a rule on direct review (perhaps while effectiveness of the rule has been stayed) is also advisable when the costs of regulatory uncertainty are particularly high. Sometimes compliance with a rule entails substantial expense that will not be fully recoverable if the rule is later overturned. Similarly, when Congress determines that there is a need to achieve important regulatory goals promptly nationwide, or when it is particularly important that rules apply industry-wide in order to avoid unfair competitive advantage to noncomplying businesses, repeated litigation over the validity of the rules in various district courts should be avoided if possible.

---

[2] The recommendation is based on the assumption that, where Congress has provided by statute for direct review of rules, that review will ordinarily lie in the court of appeals rather than in the district court. See ACUS Recommendation 75-3.

Even when Congress decides that limits on enforcement review are warranted, it should not foreclose all challenges to rules at the enforcement stage. Some grounds for review can be precluded with little unfairness to parties who may be unaware of the original rulemaking proceeding or are otherwise unable to seek direct review, while others raise fundamental questions about the substance of the rule or its application in circumstances that may have been unforeseen at the time of promulgation. Challenges based on asserted errors in the administrative process are those most suitable for preclusion. When objections on procedural grounds are raised early, errors may be remedied promptly and the rulemaking process recommenced with a minimum of disruption to the interests of those affected by the rule. And objections based on asserted inadequacy of the administrative record may lose their relevance as that record itself becomes dated. These objections, moreover, do not ordinarily turn on the situation of a particular individual or entity or on a particular interpretation of the rule and can be raised as well by one party as by another.

On the other hand, considerations of fairness and judicial economy may argue for retaining a right to raise in enforcement proceedings those objections based on asserted lack of statutory authority or the inapplicability or unreasonableness of the rule as applied to the facts of the case. Moreover, there may be constitutional inhibitions against precluding or restricting at any time challenges based on the asserted unconstitutionality of a rule either on its face or as applied.

The Conference recognizes that the line between issues of process and those of statutory authority may not always be a bright one. For example, the question of whether there is statutory authority to apply a rule to a particular situation may tend to converge with the issue of the adequacy of record support for the rule. However, if the distinctions suggested below are made, statutory provisions will afford the courts adequate guidance in most situations. When ambiguity nonetheless results, the well established presumption of reviewability will continue to apply.

---

[3] See, e.g., ACUS Recommendations 79-1 (Hybrid Rulemaking Procedures of the Federal Trade Commission) and 80-1 (Trade Regulation Rulemaking Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act).

RECOMMENDATION

1. In drafting a statute that provides for adequate pre-enforcement judicial review of rules, Congress should consider whether to limit the availability of review at the enforcement stage. In deciding whether to limit the availability of enforcement review in a particular statute, Congress should consider the following factors as favoring such a limitation:

a) The likelihood that the rulemaking proceeding will attract widespread participation;

b) The likelihood that the proceeding will involve complex procedures or intensive exploration of factual issues;

c) The likelihood that those affected by the rule will incur substantial and immediate costs in order to comply with it;

d) The need for prompt compliance with the rule on a national or industry-wide basis.

2. When Congress decides to limit the availability of judicial review of rules at the enforcement stage, it should ordinarily preclude review only of issues relating to procedures employed in the rulemaking or the adequacy of factual support for the rule in the administrative record. Judicial review of issues relating to the constitutional basis for the rule or the application of the rule to a particular respondent or defendant should be permitted when these issues are raised in subsequent suits or as defenses to subsequent enforcement actions (subject to the principles of collateral estoppel and stare decisis). Judicial review of issues relating to the statutory authority for the rule should be precluded at the enforcement stage only where Congress has concluded that there is a compelling need to achieve prompt compliance with the rule on a national or industry-wide basis.

3. When Congress limits the availability of judicial review of rules at the enforcement stage was described in paragraph 2, it should provide that, in an exceptional case when foreclosure of issues will work a severe hardship or otherwise produce a manifestly unjust outcome, a court may either dismiss or stay the proceedings and refer the rule to the affected agency for its reconsideration.

4. Paragraph D of Recommendation No. 76-4, Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act, is hereby superseded to the extent that it is inconsistent with this recommendation.

BACKGROUND REPORTS FOR RECOMMENDATIONS

82-5 THROUGH 82-7

BACKGROUND REPORT FOR RECOMMENDATION 82-5

FEDERAL REGULATION OF CANCER-CAUSING CHEMICALS

*Richard A. Merrill**

PREFACE

This report is a revised and combined version of two chapters of a longer report on federal regulation of carcinogenic substances. Readers of this version should be aware of my original conception of the full report, which may help explain what they read.

The project reflected in this report was originally commissioned by the Office of the Chairman of the U.S. Administrative Conference with only a general understanding—on the part of the Chairman's Office or myself—of what form it might ultimately take. By the time the project was assigned to a committee of the Conference, my conception of the final product had crystallized. I visualized a report, necessarily very lengthy, consisting of six chapters. The first chapter would introduce the subject of carcinogen regulation; the next four would deal with four agency programs (discussed in this version); the final chapter would attempt a synthesis and evaluation that might or might not support recommendations by a Plenary Session of the Conference.

Work on the report proceeded more slowly than anticipated, for reasons that need not be detailed here. By early 1981, I had completed chapter 2, dealing with FDA regulation of environmental contaminants of food, and chapter 3, dealing with regulation of chronic hazards by the Consumer Product Safety Commission. In addition, I had circulated drafts to the committee of chapters 1 and 4, the latter dealing with OSHA's health standards program. The two completed agency chapters have been published in the Virginia Law Review. They are *FDA Regulation of Environmental Contaminants of Food*, 66 *Va. L. Rev.* 1357 (1980) and *CPSC Regulation of Cancer Risks in Consumer Products: 1972–1981*, 67 *Va. L. Rev.* 1261 (1981). Chapter 1 developed into Part I of the present report.

At about this time the Conference concluded that recommendations should be developed based upon the research already completed and reported (even though sometimes not in final form). Accordingly, I was asked to turn to chapter 6 of my original outline, which focuses on the procedures and institutional arrangements through which the four agencies make decisions about potential cancer hazards. This chapter appears as Part II of this report. Chapter 4 remains in original draft, which is available from the Administrative Conference. Most of my research for chapter 5, dealing with EPA's regulation of pesticides, has been completed but only a preliminary draft has been submitted to the Conference.

---

* Dean, University of Virginia School of Law.

I would like to express my appreciation to several students who have given generously of their time, and to friends who have read prior versions of one or both parts. The students who have contributed importantly include Ursula Bartels, Thomas Bartman, Carolyn Flury, Chevis Horne, and John Troxel, all of the University of Virginia Law School. Margaret Mellon, a former student and lawyer with training in biochemistry, was my primary collaborator in preparing the treatment of scientific data supporting regulation which appears in Part I. Dr. Richard Bates, Joseph Rodricks, Ph.D., Dr. Marvin Schneiderman, Peter Barton Hutt, Richard Cooper, and Lester Lave read portions of the two parts and provided helpful suggestions. None of them is responsible for any statement made or judgment drawn.

I invite readers to provide comments and corrections, as well as suggestions to amplify the text or supplement current resources.

PART I: CANCER, CAUSES, AND RISK ASSESSMENT

A. *Introduction*

Debilitating and often painful, cancer currently is responsible for one-fifth of all deaths among Americans[1] and probably engenders greater fear than any other fatal disease.[2] A major part of the nation's budget for health sciences is devoted to investigating cancer and a separate research establishment, the National Cancer Institute, is concerned specifically with finding causes of and treatments for cancer.[3] In addition, both regulatory agencies and private organizations have devoted substantial resources to curtailing human exposure to chemicals suspected of posing a risk of human cancer. Four federal agencies have been principally involved in regulation of cancer risks—the Environmental Protection Agency, the Food and Drug Administration, the Occupational Safety and Health Administration, and the Consumer Product Safety Commission.[4] Each has numerous other responsibilities but rising public apprehension about cancer and disappointment with efforts to develop effective treatments led these four agencies during the last decade to make regulation of carcinogens a central and visible part of their programs.[5]

The societal resources devoted to controlling human exposure to toxic substances is perhaps the best evidence that regulation of carcinogens has become a major activity of government. It is a challenging and difficult activity, both for the responsible agencies and for the industrial firms that are the primary targets of regulation. A major source of difficulty is the highly imperfect information base for decisionmaking. Three types of uncertainties are persistent. First, the typical candidate for regulation is a substance whose potential role in human cancer is inferred from experiments in laboratory animals.[6] Theories of carcinogenesis and human experience both suggest that a chemical which induces cancer in animals poses a cancer risk for exposed humans, but confirmatory evidence for specific substances is often lacking and generally unobtainable. Accordingly, regulators, like scientists, must extrapolate from animal data to determine human risk.

---

[1] Office of Technology Assessment, Assessment of Technologies for Determining the Carcinogenic Risk from the Environment 31, U.S. Congress (1980) [hereafter OTA Report].

[2] *See* S. Sontag, *Illness as a Metaphor* (1979).

[3] *See generally*, E. Redman, *The Dance of Legislation* 29 (1974).

[4] Other agencies have been involved, including the Department of Transportation and the Department of Agriculture, but the four mentioned have been principally responsible for regulating general public exposure to hazardous chemicals.

[5] *See* Interagency Agreement: Regulation of Toxic and Hazardous Substances, 42 Fed. Reg. 54856 (1977).

A second source of uncertainty stems from disagreement among reputable scientists over the meaning of experimental results. The pathological diagnosis of tissues of animals used in testing requires both careful observation and experienced personal judgment. Pathologists may differ in their evaluation of specific tissues or, at the margin, in their diagnostic criteria. Test design may occasion disagreement, and often there is some doubt about the care with which an experiment was carried out. Study deficiencies or major differences in the interpretation of experimental findings can place the issue of a substance's capacity to cause cancer in serious doubt.

A third uncertainty arises from the usual disparity between doses that have been associated with cancer induction and the exposure levels that are actually confronted by humans or that are achievable without considerable sacrifice. An agency may have experimental evidence suggesting that Chemical A induces cancer at high concentrations in animals, but it is usually contemplating human exposures at a level orders of magnitude lower. Even when this gap does not exist, an agency must decide how far exposure must be reduced to protect human health adequately. Federal regulators have accepted the premise that no level of exposure to a carcinogen can be considered ''safe'' for all members of an exposed population.[7] Thus, their ultimate task is to decide what degree of risk can be accepted, given the costs of controlling it.

This question lies at the heart of any decision to control human exposure to a potential carcinogen. Existing statutes provide divergent instructions to the agencies responsible for answering it. A few statutes, epitomized by the famous Delaney Clause,[8] can be said to embody Congress' categorical balancing of risks and costs. Other statutes, like the Federal Insecticide, Fungicide, and Rodenticide Act, and other recent environmental control laws, leave administrators to balance risks and costs, with varying degrees of guidance.[9] This study explores and attempts to evaluate how agencies assigned this large responsibility have exercised it. Particular attention is devoted to the procedures and institutional arrangements that they have used in making decisions about cancer risks and the costs of reducing them.

---

[6] For our purposes, a ''carcinogen'' is a substance that has been found to induce an excess of tumors in experimental animals or in humans.

[7] *See Scientific Bases for Identification of Potential Carcinogens and Estimation of Risks, Report of the Interagency Regulatory Liaison Group*, 63 J. Nat. Cancer Inst. 243, 264–65 (1979), also reprinted at 44 Fed. Reg. 39857 (1979) [hereafter IRLG Scientific Principles].

[8] *See* Food, Drug and Cosmetic Act § 409(c)(3)(A) (codified at 21 U.S.C. 348 (1976)); *see also* Merrill and Hutt, *Food and Drug Law*, 77–78 (1980) [hereafter Merrill and Hutt].

[9] *See* OTA Report at 180–82.

Part I surveys the landscape of federal regulation of carcinogens. It summarizes the scientific principles that guide agencies in their identification and assessment of chemical carcinogens, and describes the types of evidence on which they rely. It explains why current understanding of carcinogenesis forces government regulators to balance health risks and regulatory costs in designing control strategies for carcinogens, and it reviews the empirical methods used to inform this process. The objective is to provide readers with background sufficient to evaluate the performance of the four agencies, which is assessed in Part II and in related studies.

B. Nature, Incidence, and Causes of Cancer

It is not the purpose of this section to provide a scientific treatise on the etiology or prevalence of human cancer. A rudimentary introduction to the underlying mechanisms of the disease will, however, aid understanding of the problems confronting regulatory agencies. A summary of recent trends in reported cancer incidence will enable the reader to evaluate the public health significance of government attempts to regulate toxic chemicals.

Two introductory caveats are to be noted. First, the following descriptions of the development and occurrence of cancer are necessarily oversimplified and very possibly obscure areas of scientific ignorance or debate. Second, the discussion of cancer prevalence and demography, later in this section, should not be understood as minimizing the seriousness of the disease or the importance of efforts to control it. Rather, the objective is to place in perspective the public health implications of regulatory initiatives which are almost always controversial.

1. Nature of the Disease.

The term "cancer" describes several similar but distinct diseases, all of which are characterized by aberrant and uncontrolled growth of abnormal cells. There are three main types of cancers: carcinomas, which invade the body's internal and external surfaces and glands and account for over 90 percent of cancer deaths; sarcomas, which attack the body's connective tissues and bones; and leukemias, which are cancers of the blood cells.[10] All three types develop in similar fashion. Cancer cells are descendants of normal cells but their response to the body's mechanisms for control of cellular growth has been altered, usually by exposure to an exogenous agent.[11] Some tumors are benign, i.e., are self-contained, and these are usually easily removable by surgery; others metastasize, i.e., spread to other parts of the body, and thus are biologically malignant.[12] Benign tumors can, but do not invariably, become malignant. Some biologically benign tumors, however, may eventually destroy so much adjacent normal tissue that they can be characterized as clinically malignant. It is this invasion and destruction of normal body tissue in central organs where tumors occur that can ultimately cause death of the host.

---

[10] Cairns, *The Cancer Problem*, 233 Scientific American 64 (1975) [hereafter Cairns].

[11] *Id.*

[12] *Id.* at 73.

Cancers probably do not develop in a single step, but through a multi-stage process that has two main phases: initiation and promotion.[13] In the initiation stage, an agent induces an irreversible change, probably a mutation, in some cells. This event alone, however, may not necessarily lead to the growth of malignant tumors. The multiplication of mutant cells into a tumor is the second stage of the process, and is often triggered by one or more promoting agents which by themselves have little or no capability of causing cancer.[14] Initiating agents, or initiators, are usually capable of precipitating both phases if exposures are large or repeated. Promoters, on the other hand, only act on cells previously changed by exposure to an initiator. The promotion stage may not follow immediately after initiation; there is often a considerable lag time between exposure to a carcinogen and development of cancer.

2. *Trends in Cancer Incidence.*

In 1900, approximately 4 percent of all U.S. residents died of cancer.[15] By the mid-1930's, cancer accounted for an estimated 18 percent of all deaths, and by 1980 this figure had risen to 20 percent.[16] The proportion of the population dying of cancer has thus risen sharply since 1900; whether the nation is experiencing an increase in cancer *incidence*, however, is debated. Reports of rising cancer rates triggered public anxiety in the early 1970's,[17] but more careful analysis revealed that most of the observed increase was attributable to the rising percentage of the population surviving to older ages and to the rise in lung cancer resulting from widespread cigarette smoking.[18] The view persists that age-corrected cancer rates have generally remained stable since the turn of the century, but apprehensions about a cancer ''epidemic'' have periodically been revived by well-publicized reports. In 1979, for example, a National Cancer Institute scientist suggested that increases in age-corrected cancer incidence could not be accounted for by cigarette smoking.[19] The implication was that other causes were at work.

Reports of a rise in cancer have generated intense controversy and have not yet gained acceptance. At the base of the disagreements is the fact that reliable data for measuring cancer incidence do not exist. In recent years the National

---

[13] *Tumor Promoters: Carcinogenesis Gets More Complicated*, 201 Science 515, 515 (1978) [hereafter Tumor Promoters].

[14] *Id.*

[15] *See* Pollack and Horm, *Trends in Cancer Incidence and Mortality in the United States*, 1969–76, 64 J. Nat'l Cancer Inst. 1091 (1980) [hereafter Pollack and Horm].

[16] *Id.*

[17] Higginson, *Perspectives and Future Developments in Research on Environmental Carcinogenesis*, 1:7, 202 Carcinogenesis: Identification and Mechanisms of Action, ed. C. Griffin, and C. R. Shaw (1979) [hereafter Perspectives on Environmental Carcinogenesis].

[18] *Id.*

[19] Toxic Substances Strategy Committee, Toxic Chemical and Public Protector, a Report to the President (Gov't Printing Office, May 1980) [hereafter Toxic Substances Report]. The report cites the analysis by M. A. Schneiderman of the cancer incidence data of Pollack and Horm, *supra* note 15. Schneiderman estimated that less than half of the increase in cancer incidence reported by Pollack and Horm was due to smoking and suggested that chemical carcinogenesis might account for the remainder of the increase.

Cancer Institute has launched two major survey programs to determine cancer incidence: the Third National Cancer Surveys (TNCS), covering 1969–1971, and the Surveillance, Epidemiology and End Result Program (SEER), which in 1973 began to collect cancer incidence and survival data on an annual basis.[20] Each survey program covered 10 percent of the U.S. population. The 1979 report mentioned above relied on data from these surveys in concluding that cancer incidence is rising.[21] Further analysis of the data was purported to confirm this conclusion even when cigarette smoking was controlled for.[22] Critics of the report, however, have pointed out that the successive samplings covered different, albeit similar-sized, populations. The observed differences in cancer incidence could, accordingly, simply reflect differences between the populations studied rather than any increase in cancer.[23] Furthermore, critics have questioned the method used by the NCI scientists to account for the large effect of cigarette smoking.[24]

In a study that is perhaps the most comprehensive recent effort to assess cancer incidence in the United States, British epidemiologists Doll and Peto questioned claims that cancer was increasing. The types of cancers being observed and the trends recorded, they concluded, "do not . . . suggest that the United States is beginning to experience an epidemic of cancer due to new factors."[25] Doll's and Peto's assessment has been endorsed by many health leaders in this country. Yet other experts, sometimes relying on different health statistics, continue to see evidence of rising cancer incidence that is possibly attributable to industrial activity.

Accurate description of the historical incidence of cancer could facilitate an evaluation of the long-term effects of exposure to industrial chemicals.[26] For example, cancer rates before and after large-scale industrialization could be compared to estimate the proportion of cancer that might be attributed to exposure to industrial chemicals.[27] Since it is primarily these substances that are subject to regulation, such an estimate would establish an upper limit of the potential impact of regulation on cancer incidence.[28] Because the occurrence of cancer in any period reflects exposures to carcinogens that commenced years before,[29] the stable rates of most cancers recorded through the 1970's does not demonstrate conclusively that increased production of chemicals after World War II has not affected cancer incidence.[30] The time elapsed is now approaching the latency period for many cancers, however, and data gathered during the current decade should help resolve this issue.

---

[20] *See* Toxic Substances Report at 146, 149.

[21] *See* Pollack and Horm.

[22] *See* Toxic Substances Report at 160–165.

[23] Smith, *Government Says Cancer Rate is Increasing*, 209 Science 998, 1000 (1980). In a few years, SEER's components will have been standardized for a sufficient time to provide dependable cancer trends. In the interim, it seems best to consider the NCI figures to be suggestive, rather than determinative, of cancer incidence rates.

[24] *See* Toxic Substances Report at 161–164; Smith, *op. cit. supra* note 23, at 1002.

[25] Doll and Peto, *The Causes of Cancer: Quantitative Estimates of Avoidable Risk of Cancer in the United States Today*, 65 J. Nat'l Cancer Inst. 1191, 1258 (1981) [hereafter Doll and Peto].

[26] Industrialization, however, has also been accompanied by changes in lifestyle that may affect human susceptibility to carcinogens and thus the incidence of cancer. This possibility complicates attempts to attribute changing incidence to industrial chemicals or to see the difference as the upper bound estimate of their effects. See Comments of Marvin Schneiderman to the author, March 1981 (copy on file at the University of Virginia School of Law) [hereafter Schneiderman Comments].

[27] Higginson concludes on the basis of epidemiological studies which have tried but failed to detect relationships between cancer incidence and industrialization that "only a small part of the cancer burden can be directly related to industrialism in a general sense or to diffuse exposures in the general environment. . . ." Speech by John Higginson, M.D., Director of the International Agency for Research on Cancer, to Joint Board Council Committee on Environmental Improvement (1981) [hereafter Higginson Speech].

There are two important trends about which there is no serious dispute. One is a marked increase over the years in lung cancer, which is attributable largely to cigarette smoking;[31] the other is a marked decrease in stomach cancer, for reasons that are still a matter of conjecture.[32] Rates for cancers at other sites have altered more gradually. For example, NCI estimates that the incidence of cervical cancer is decreasing 6 percent annually, while the incidence of melanoma skin cancer is rising at a like rate.[33] The fluctuating, patchwork distribution of cancer obstructs description of overall cancer incidence, and recent improved detection procedures may also make interpretation of general incidence data treacherous. The picture is also potentially distorted by the general aging of the population,[34] and the decline in incidence of infectious diseases, which once competed with cancer as causes of death.[35] Still another complication is the generational association, or "cohort effect," of some cancers.[36] For example, because persons born early in this century are more likely to have smoked cigarettes than persons born either before or since, the reported rate of lung cancer can be expected to increase as more of them reach advanced age.

---

[28] Even if a relatively certain number could be obtained for the percentage of cancer attributable to industrial causes, government cannot feasibly eliminate all exposure to industrial chemicals. At most, government agencies can reduce some of the risk due to only a few of the causes of cancer.

[29] *See* Toxic Substances Report at 119–20.

[30] Davis and Magee, *Cancer and Industrial Chemical Production* 206 Science 1356 (1980). The authors caution against relying too heavily on the aggregate production statistics for all organic chemicals in pegging the time at which human exposure to harmful chemicals began to increase, and consequently, the time to decide whether exposure to industrial chemicals has contributed to the cancer burden. First, production levels are only indirectly related to levels of human exposure. Second, not all chemicals pose a health hazard and the assumption that the proportion of chemicals with high carcinogenesis risk and wide human exposure was the same in 1940 as later may not be well founded. According to the authors, aggregate production of synthetic organic chemicals has doubled every 7 to 8 years since the early 1940's. Using a 20 to 30 year lag period for the appearance of cancer, these data on aggregate production suggest an increase in cancer incidence would have been expected in the late 1960's or 1970's. But the authors also compiled individual production histories for seven high risk chemicals presently receiving regulatory attention, e.g. acrylonitrile and perchloroethylene, and concluded that the first widespread and high level human exposure to these substances did not occur until the 1960's. Cancer resulting from these exposures might not be expected until as late as the 1990's.

[31] *See* Toxic Substances Report at 119–20; Cairns, note 10 *supra*, at 73 (graphs entitled Cigarette Smoking and Lung Cancer); OTA Report at 69–72.

[32] Cairns, note 10 *supra*, at 72. See also Higginson Speech, Slide 17 (stomach cancer decreased by 49%).

[33] *See* Pollack and Horm at 1098–1100.

[34] OTA Report at 32.

[35] *Id.*

[36] *Id.* at 31.

Thus, the picture of cancer in the United States today cannot be captured in a single statistical table. The reported findings that cancer incidence is increasing annually at a rate of 1.3/1.5 percent for men and 2.0/1.8 percent for women, even if they were not disputed, mask counter-trends that site-specific analysis reveals.[37] Furthermore, cancer incidence is rising faster than cancer mortality,[38] indicating that we are having greater success in prolonging lives among those who do get cancer even while the disease accounts for a growing percentage of all deaths.

The controversy over whether cancer rates are rising notwithstanding, cancer unquestionably is a serious public health concern. Yet it is important to recognize that turn-of-the century cancer rates among those who lived long enough to exhibit the disease were roughly equivalent to the current rates.[39] This observation suggests that factors in the pre-industrial environment caused cancer with almost the same frequency as we experience today, and it should lead us to pause before accepting the notion that cancer is *primarily* a result of industrial activities whose by-products can be controlled through regulation.

3. The Role of Environmental Carcinogens.

The importance of regulation in reducing the incidence of cancer depends, obviously, on the extent to which cancers are caused by substances that can be controlled through regulation. If a large proportion of current cancers were caused by chemicals added to food, used in consumer products, and encountered in the industrial environment, efforts to limit exposure to these substances might promise major health gains; if such exposures contribute little to cancer incidence, regulation would be less important. Not surprisingly, therefore, the role of environmental agents in cancer induction has also been the focus of intense debate. There is, as well, confusion about the meaning of the term ''environmental.''

A major obstacle to evaluating the role of environmental exposures has been our still primitive understanding of the biological origins of cancer. While medical science has had some success in developing treatments, its efforts to explain the causes of cancer have lagged. These efforts have been complicated by the wide variety of cancers, which appear to have different causes and mechanisms. For example, cigarette smoking is the primary cause of lung cancer, but does not appear to have any relation to skin cancers, most of which are caused by exposure to the sun's natural radiation. A further complication in establishing causal relationships stems from the multi-stage, multi-cause nature of cancer.[40] Some substances, such as cigarette smoke and asbestos, are capable of causing cancer independently, but when a person is exposed to them in combination, the risk of cancer increases much more than additively.[41] In the face of this diversity, a simple cause and effect theory of cancer development probably cannot be sustained.[42]

---

[37] *See* Pollack and Horm at 1095–97.

[38] *Id.* at 1095–1100.

[39] *See* Toxic Substances Report at 147; Perspectives on Environmental Carcinogenesis at 198.

[40] *See* Tumor Promoters at 515; OTA Report at 66–68.

While the prevailing belief is that most cancers are induced by "environmental causes,"[43] this generalization is easily misconstrued. Some have interpreted the phrase as a shorthand accusation of industrially-related chemical pollution as the chief culprit. However, the principal early advocate of the environmental hypothesis, John Higginson, has criticized this as an oversimplification.[44] For him, environment is "what surrounds people and impinges upon them."[45] Thus, in addition to industrial projects and discharges, it includes dietary habits, lifestyles, preferences such as smoking and sunbathing, place of residence, and other circumstances within individual control.[46]

The multi-cause nature of cancer and the synergistic properties of many carcinogens make determining the percentage of cancer attributable to industrial chemicals difficult. The NCI survey purports to show that increases in cancer incidence cannot be attributed solely to smoking.[47] Industry spokesmen, interpreting this finding as an allegation that more cancer is attributable to industrial discharges and occupational exposures, have argued persuasively against this inference.[48] Other estimates of the contribution of industrial chemicals to human cancer range from as low as 1 percent to over 20 percent.[49] The latter figure is extrapolated from studies of workers exposed to a single substance, asbestos; it assumes that, given the number of new chemicals being introduced, other carcinogens of comparable potency will emerge in the future.[50] Both this assumption and the interpretation of the data on asbestos have been strongly attacked.[51] Higginson and Muir, using a site-by-site approach, and controlling for relevant factors such as smoking and "background" incidence, have projected that chemical/occupational factors may be responsible for as much as 10 percent of lung cancers, 30 percent of bladder cancers and leukemias, and all of the rare mesotheliomas.[52] Doll and Peto, in what is probably the most elaborate analysis to date, estimate that at most 5 percent of cancers are attributable to manufactured chemicals.[53]

---

[42] Current theories of carcinogenesis have virtually abandoned the hypothesis that most cancers are caused by viruses, though viruses may well play some role in cancer development. See OTA Report at 105–06.

[43] Maugh, *Cancer and Environment: Higginson Speaks Out*, 205 Science 1363 (1979) [hereafter Higginson Interview]. Higginson's "best estimates" attribute 24 percent of the cancers in women to known environmental factors like tobacco and sunlight and 63 percent to presumed environmental factors of lifestyle. The equivalent percentages for men are 53 and 30 percent.

[44] *Id.*

[45] *Id.* at 1363.

[46] *Id.*

[47] *See* note 19 *supra*.

[48] *See* Morgan, *Comment on Papers by Schneiderman and Pollack and Horm*, cited in "Analysis of Cancer Incidence and Mortality," American Industrial Health Council (1980). But *see* sources cited note 23 *supra*.

[49] In a public review draft a group of scientists at NCI, NIOSH, and NIEHS estimated that 20 to 39 percent of cancers are associated with (but not necessarily attributable to) occupational exposure. K. Bridbord, P. Decaufle, J. F. Fraumeni, Jr., D. C. Hall, R. N. Hoover, D. P. Rall, U. Saffiotti, M. A. Schneiderman, and A. C. Upton, "Estimates of the Fraction of Cancer in the United States Related to Occupational Factors" (1978) [hereafter NCI Estimates Paper]. The lower estimates for cancers due to occupational exposure were reported by Higginson and Meier, *The Role of Epidemiology in Elucidating the Importance of Environmental Factors in Human Cancer*, 1 Cancer Detection and Prevention 79 (1976), and *Environmental Carcinogenesis: Misconception and Limitations to Cancer Control*, 63 J. Nat'l Cancer Inst. 1291 (1979).

[41] Hammond and Selikoff, *Relation of Cigarette Smoking to Risk of Death of Asbestos-Associated Disease among Insulation Workers in the United States* 312–317, in Biological Effects of Asbestos, eds. Bogovski, Gilson, Timbrell, Wagner (1973).

The numerous estimates suggest that while industrial chemicals are not the causes of most cancers today, their role in the development of certain types is probably significant. Furthermore, because of the slow development of cancer, there is always the possibility that chemicals now considered safe will later be shown to be malign. These considerations support continued activity by the agencies responsible for regulating hazardous substances. It is also apparent, however, that many so-called "environmental" causes of cancer are controllable by individuals, e.g., smoking, alcohol consumption, and dietary patterns.[54] In addition, some cancers may be attributable to physical factors, such as time spent at higher altitudes where ultra-violet radiation is more intense.[55] Any attack on cancer incidence must therefore be broad-based and stress education about individual opportunities to reduce risk. And in evaluating the performance of regulatory agencies we must recognize that even comprehensive control of exposure to industrial chemicals probably would not affect most cancers.

Furthermore, even greater success in controlling causes of cancer might not bring about dramatic improvements in aggregate public health. The Conference on Death and Dying recently published an analysis, based on published actuarial data, of the ultimate goal of regulating carcinogens, viz., the elimination of cancer as a cause of death.[56] The Conference first compared the main causes of death today and those reported at the turn of the century.[57] Numerically, the most important causes of death among adults in 1900 were infectious diseases: influenza and pneumonia headed the list, tuberculosis was a close second, and gastroenteritis ranked third. Cancer ranked well behind, in eighth place. Now, by contrast, the three leading causes of death among adults are degenerative diseases: heart disease, cancer, and stroke. The changes in the list testify to the success of individual lifestyles and public health measures in eliminating infectious disease, which now rank fifth among causes of death.[58] Degenerative diseases typically materialize late in life. The shift to heart disease and cancer as leading causes of death accordingly parallels an increase in average life expectancy.[59]

---

[50] The Toxic Substances Report discussed the methodology used in the estimates paper to obtain the high values (20–38%) for the occupational contribution to the cancer burden and points out that attributing all lung cancers observed in asbestos workers to asbestosis, thus ignoring the contribution of smoking, resulted in an overestimate of the number of lung cancers associated with asbestos. The report also mentioned several other methodological features which lead to an overestimate of the occupational contribution and still others which suggested that the first number was an underestimate. Since the magnitude of these correction factors cannot be determined, the usefulness of the NCI Estimates Paper is severely undermined.

[51] *See Industry Council Challenges HEW on Cancer in the Workplace*, 202 Science 602 (1978).

[52] Higginson and Muir, *Environmental Carcinogenesis: Misconception and Limitations to Cancer Control*, 63 J. Nat. Cancer Institute 1291 (1979).

[53] Doll and Peto at 1238–45, 1256.

[54] Perspectives on Environmental Carcinogenesis at 194–195. Although diet undoubtedly affects cancer incidence, it is difficult to design dietary measures for control of the disease. Diet affects human health in numerous and varied ways, and there is some evidence that dietary changes that may reduce cancer risk may also increase the risk of heart disease. Elimination of saccharin has been claimed to be such a measure. Even the evidence on optimum diet for cancer avoidance is rather ephemeral. Schneiderman Comments, *supra* note 26, at 12.

[55] OTA Report at 102–03, 137–38.

Although these data reveal success in postponing the average occurrence of death to older ages, there is little evidence that the biological life span of humans has been increased. Recognizing that all humans will eventually die, the Conference study analyzed the effects of eliminating cancer as a cause of death. The study's central conclusion was surprising: "Actuaries tell us that if cancer were to be eliminated as a cause of death, average life expectancy would be increased by 2.5 years for those under 35. . . . At age 65 the expectation of life, if cancer were eliminated, would increase by only 1.4 years."[60] Obviously, individuals "saved" from cancer would succumb to death from some other cause. Making the assumption that those spared would succumb to other causes of death in proportion to their current numerical importance, the authors of the study estimated that 193,000 more people would die of heart disease, 45,000 of strokes, and 20,000 of accidents.[61]

These computations dramatize the significant difference in public health terms between eliminating a disease in 1980 and eliminating a disease in 1900. Eradication of infectious diseases early in the century both eliminated a prominent cause of death *and* dramatically extended human life expectancy.[62] Today, because the major fatal diseases strike so late in life, the elimination of one disease has the effect of substituting another cause of eventual death without comparable effects on average life span. Of course, causes of death differ sharply in their accompanying consequences, such as individual suffering and the costs of treatment. Moreover, small gains in life expectancy spread over a large population may seem very significant. Nonetheless, it is instructive to realize that the aggregate effect of eliminating cancer would be to "expose" *most* current cancer victims to death from other diseases within a relatively short time.[63] And since the probable causes of most of those deaths also often require extensive medical treatment, total health care costs might not shrink dramatically.[64]

---

[56] *If Nobody Died of Cancer . . . ? An Analysis of Demographic Data*, Conference on Death and Dying: An Examintion of Legislature and Policy Issues, ed. J. Dinstusie (1976).

[57] *Id.* at 12.

[58] *Id.* at 13.

[59] *Id.* at 11.

[60] *Id.* at 13.

[61] *Id.* at 14.

[62] *Id.* at 11–12.

C. The Regulatory Dilemma

1. Tenets of Carcinogen Regulation.

Although the choices confronting agencies responsible for regulating carcinogens may not be unique, the common necessity to balance incommensurate values imposes special difficulties. Designing controls for any carcinogen inevitably involves a tradeoff, implied or express, between health benefits and other values. The necessity to choose stems from the tenet that no level of a carcinogen can be considered safe. It has generally been assumed that any exposure to a carcinogen, no matter how small, entails a small but greater-than-zero risk of cancer.

This assumption contrasts with the premises that have historically governed regulation of toxic materials. Classical toxicology holds not only that the substance's toxicity is a function of the dose, but also that there is some dose below which an exposed organism will not experience any adverse effects.[65] In other words, some level of the substance can be considered literally "safe." To determine such a level for a conventional toxicant, the regulator requires the substance to be tested in experimental animals to determine the dose level at which no adverse effects are observed. To this "no observed effect level" he then will apply a so-called safety factor, *i.e.*, a discount, of 10, 100, or occasionally even 1000, to allow for the genetic variability of the population.[66]

While this approach has been questioned,[67] it is in principle consistent with prevailing theories about the occurrence of toxic effects. Conventional toxicants are assumed to have a threshold because the kinds of effects they produce occur only when enough cells are functionally impaired to produce an adverse effect on the organism as a whole. For example, most individuals can sustain damage to a few liver cells with no ill effects, because undamaged cells will take over their functions. It is only when many of the cells in a specific organ are damaged that the body is unable to compensate and permanent harm results.[68] Furthermore, the traditional "safety factor" approach often provides the basis for an agency to defend an exposure limit that still permits use of a toxic substance. If the level estimated to be "safe" cannot be achieved without major sacrifice, of course, the agency may have to moderate its insistence on safety. The important point, however, is that the scientific premises underlying regulation on conventional toxicants do not inexorably force a compromise between enhancement of human health and other societal objectives.

---

[63] The time may not be nearly as short as the cited figure suggests, however. If only 20 percent of the population die from cancer, elimination of the disease should yield 12.5 additional years of life for those who now die of cancer, i.e., 2.5 years times 5. Schneiderman Comments at 15.

[64] Conference on Death and Dying Report at 15.

[65] Zbinden, *The No-Effect Level, an Old Bone of Contention in Toxicology*, 43 Archives of Toxicology 3 (1979).

[66] See 21 C.F.R. § 170.22 (1978); R. Merrill, *Regulating Carcinogens in Food: A Legislator's Guide to the Food Safety Provisions of the Federal Food, Drug, and Cosmetic Act*, 77 Mich. L. Rev. 171, 207 (1979) [hereafter Merrill, Carcinogens in Food]. See also Schneiderman and Brown, *Estimating Cancer Risks to a Population*, 22 Environmental Health Perspectives 115, 117 (1978).

[67] *See* Zbinden note 65, *supra*.

[68] Kimm, Kuzmach, and Cotruvo, *The Questionable Value of Cost-Benefit Analysis: The Case of Organic Chemicals in Drinking Water* 4–5, (1979).

Precisely such a trade-off is dictated by the prevailing tenets governing the regulation of substances that are believed to pose a risk of cancer. For such a substance, whether identified by animal experiments or through analysis of human exposure,[69] regulators have assumed that no finite level of exposure can be considered safe for all individuals. This "no threshold" assumption is not strictly a statement of scientifically demonstrated fact; rather it represents a regulatory policy based on both hypothesis and prudence.[70]

The "no threshold" policy has been supported, first, by uncertainty about how cancer occurs, coupled with the hypothesis that even a single molecule of a carcinogen can initiate cancer in a vulnerable individual. Understanding of the process of chemical carcinogenesis remains incomplete, but cancer is believed to begin in the DNA of a single cell which becomes transformed into a tumor cell that can multiply uncontrollably and eventually kill the host. By whatever means chemical carcinogens participate in that process, only one molecule or a few molecules are likely to be involved in the initial reaction with cellular components.[71] The likelihood that any molecule will reach and interact with the critical DNA site is small, however. For this reason, the risk that cancer will actually develop at low exposure levels is itself low, but it increases with increasing doses.

The "no threshold" assumption has also been supported by the inability of laboratory scientists or epidemiologists to demonstrate a no-effect level for carcinogens.[72] The small size of standard animal experiments make it impossible, even when no positive response is obtained at a given dose, to rule out the possibility that a larger sample would have revealed such a response. Enlargement of a study population can reduce, but never eliminate, this possibility of a false negative.[73] The numbers of humans at risk in most epidemiological studies are typically much larger, but the problem remains. Furthermore, interpretation of negative findings is complicated by lack of good information about dose levels, duration of exposure, and individual health histories.[74]

---

[69] See text accompanying notes 198–284, *infra*.

[70] For a statement of the threshold concept accepted by four major agencies regulating carcinogens, see IRLG Scientific Principles at 264–65.

[71] For that single molecule to reach the vulnerable point in the cell, another complex process of metabolic transformation and transport must occur. *See* OTA Report at 66.

[72] See text accompanying notes 222–48, *infra*.

[73] See text accompanying notes 234–35, *infra*.

[74] See OTA Report at 40–42 (discussion of the errors which may inhere in relying on death certificates as a source of raw data for the calculation of cancer incidence).

It is for these reasons that regulatory agencies have accepted as an article of faith that any level of exposure to a substance capable of causing cancer carries some risk, i.e., the possibility that one or more members of the exposed population may get cancer. An important, less universally accepted corollary is that the risk presented by an initiator carcinogen is roughly proportional to dose. This corollary is supported by limited human evidence and consistent with the behavior of most agents identified as carcinogens in animal experiments. Several biostatistical models have been developed to define the relationship, *i.e.*, to estimate the shape of the dose-response curve for individual carcinogens. While these models have different rationales and sometimes project widely varying dose-response relations, most assume that the risk of cancer disappears only when the dose of a carcinogen reaches zero.[75]

For many years a third operating assumption has enjoyed acceptance among regulatory agencies: All carcinogens were alike; no distinctions could be *demonstrated* among agents associated with an increase in tumors in man or in animals that justified different regulatory outcomes.[76] The reluctance of regulators to draw such distinctions stemmed initially from a lack of theoretical bases for distinguishing among carcinogens based on the way in which they interact with mammalian cells. Scientists have more recently come to recognize a variety of mechanisms by which agents contribute to the development of cancer.[77] Generally, however, neither experimental evidence nor clinical studies have yet provided convincing evidence for characterizing the mechanism of specific carcinogens in regulatory proceedings.[78]

Regulatory agencies accept a fourth premise that largely determines the type of evidence on which they rely. They believe that the experience of animals exposed to a substance provides good evidence for predicting its effects in humans. This correlation underpins modern toxicology and pharmacology, and has been accepted by regulators for decades in estimating both acute and chronic toxicity in humans. The long latency of most cancers, coupled with requirements for premarket evaluation of safety, have made animal experiments the principal source of data for regulatory decisions concerning potential carcinogens.

The central tenets of regulation can thus be summarized: (1) Any substance that induces cancer in animals presents a probable risk of cancer for man. (2) No dose of such a substance can be characterized as completely "safe." (3) The risk of cancer can, however, be reduced by limiting human exposure. This does not mean that agencies routinely *regulate* all animal carcinogens as cancer risks to humans or automatically seek to prevent any exposure whatever. Agencies have sometimes declined to treat a substance that causes cancer in animals as posing a risk of cancer for man because of differences in route of exposure or in metabolism.[79] Furthermore, an agency may conclude that the risk associated with very low levels of exposure to a recognized carcinogen is so slight as to be of no concern, and thus ''safe'' in some colloquial sense. Nonetheless, the summary correctly states the prevailing premises of federal regulation, which define the dilemma confronting regulatory agencies: If any exposure to a carcinogen carries some risk of cancer and reducing exposure will diminish the risk, how shall an agency determine the level of exposure to be permitted?

---

[75] Schneiderman and Brown, *Estimating Cancer Risks to a Population*, 22 Environmental Health Perspectives 115, 118–19 (1978).

[76] *See* IRLG Scientific Principles at 246.

[77] *See* Tumor Promoters, note 13, *supra*.

[78] There have nonetheless been suggestions that science should develop the bases for regulatory distinctions between promoters and initiators, accompanied by recommendations that regulators should act on them. See, *e.g.*, Kolbye, *Impact of Short-Term Screening Tests on Regulatory Action*, in Applied Methods in Oncology No. 4, Elsevier Biomedical Scientific Publishing Company, Amsterdam (1980); Potter, *Initiation and Promotion in Cancer Formation: The Importance of Studies on Intercellular Communication*, 53 Yale Journal of Biology and Medicine 367 (1980). While available information about chemical carcinogens is usually insufficient to show that they act through a mechanism for which there is a threshold, in a few cases physical mechanisms have been demonstrated. Schneiderman Comments at 20.

2. *Typology of regulatory approaches.*

At least two regulatory issues must be resolved to justify government action to regulate human exposure to a chemical. First, it must be determined whether the chemical is capable of harming persons who may be exposed. And, second, it must be determined whether humans are likely to be exposed to the chemical. In the absence of affirmative answers to both, government intervention to control exposure would be difficult to justify. A very few statutes require only these two findings as prerequisite for regulation. An example is the Food Additives Amendment to the Federal Food, Drug, and Cosmetic Act[80] which requires FDA to disapprove, *i.e.*, prevent human exposure to, any food additive shown to be capable of causing cancer. Indeed, under the Amendment FDA rarely need trouble with the issue of exposure, which ordinarily is taken as conceded by the filing of a petition for marketing approval.[81]

Most laws under which carcinogens are regulated, however, demand that the agency consider other criteria. These other criteria, though multifaceted, can be summarized under two headings: the magnitude of the risk posed by a chemical and the effects of regulating it. One can also visualize a decisional formula that required an agency to consider only the former of these criteria, in addition to toxicity and exposure. Thus, government might undertake to control exposure to chemicals that pose a risk greater than some specified level, but not to weigh any costs of control. Such a standard would force the decisionmaker to find methods for quantifying risk, but it is not as demanding—of thought or information—as a standard that requires consideration of the effects of controlling exposure. It thus leaves unexplored issues that are relevant to rational regulatory choice.

---

[79] The nutrient selenium has been associated with an increase in cancers of the liver in experimental animals, but FDA has explicitly authorized its addition to both human and animal food. 38 Fed. Reg. 10458 (1973); 39 Fed. Reg. 1355 (1974). The premise for the agency's decision was that the substance was not a direct-acting carcinogen, but promoted the development of tumors by damaging liver tissue. See *Bureau of Food ''Double Standard'' on Selenium Alleged*, Food Chemical News, July 6, 1981, at 28.

[80] *See* note 8 *supra*, and accompanying text.

[81] *See generally* Merrill, Carcinogens in Food at 204–09.

It is difficult to visualize a standard that required an agency to consider the issues of toxicity, exposure, and costs of control, but not the magnitude of the risk. Yet most statutes fail to address this subject, and some early decisions appear consistent with the belief that the magnitude of the risk either did not matter or could not be determined. In recent years, however, agencies have sought ways of quantifying the risk posed by carcinogens.[82] If an agency must consider other values in deciding whether or how to regulate, quantification becomes critical. Without some quantitative measure, however rough, of the health risks presented by various levels of exposure to a carcinogen, an agency has no way of determining whether control measures are too costly or too lenient.

The criteria for regulatory decisionmaking embodied in current legislation fall into three broad categories. A very few statutes mandate a "no risk" policy, which means that the administering agency must attempt to prevent human exposure to any carcinogen. Other laws, either expressly or through administrative construction, focus exclusively on the issue of risk but essentially direct the agency to regulate only significant risks. A third, much broader class of laws direct the administering agency to allow other criteria to moderate its efforts to protect human health. These criteria may be limited to the technological capability of an industry to reduce exposure, or they may include a wider range of consequences of regulation. While the laws within this last category vary widely, they all in some fashion permit regulators to determine how much safety should be required.

This question is central to the decisions of EPA, FDA, OSHA, and the CPSC that are the subject of this study. The laws they administer do not provide the same answer.[83] Indeed, it has been suggested that current legislation reflects no coherent Congressional policy toward cancer risks, but rather conveys quite disparate and sometimes even contradictory directives to regulators.[84] The reality is less disconcerting.

To be sure, the nearly thirty statutes[85] under which Federal agencies regulate carcinogens seem to express different degrees of concern about risks to human health and about the weight to be given economic costs in determining control levels for toxic agents. This diversity has several explanations. The laws were enacted at different times. More recent statutes reflect increased Congressional sensitivity to economic costs and describe in more detail the factors an agency shall consider in setting control levels.[86] The laws originated with, and remain under the influence of, different political constituencies. One would expect that legislation drafted by the House Agriculture Committee would reflect greater concern about economic costs of restrictions on pesticide use than laws designed to protect worker health sponsored by the Senate Committee on Labor and Public Welfare. Perhaps most important, none of the laws was enacted for the sole purpose of controlling cancer risks; rather each is addressed to a particular medium or commercial activity that may present several kinds of health hazards.

---

[82] See text accompanying notes 290–341 *infra*.

[83] OTA Report at 176–181.

[84] "A Low Growth Microcosm," Wall Street Journal, October 10, 1976.

[85] OTA Report at 178–179.

[86] See, e.g., Consumer Product Safety Act, 15 U.S.C. §§ 2651-2082 (1976 and Supp. III 1979); Toxic Substances Control Act, 15 U.S.C. §§ 2601–2631 (Supp. III 1979).

None of the laws examined in this study expressly mandates formal balancing of health benefits and costs; Congress has not directed any agency to perform the kind of rigorous cost-benefit analysis that many economists espouse.[87] More commonly, it has prescribed regulation of "unreasonable" risks, sometimes specifying the consequences that it wants the agency to consider and occasionally intimating that the agency should not impose controls that are too costly. The very looseness of Congress' language in many laws suggests that, at least in the majority of cases, there are not insurmountable legal impediments to adoption of consistent policies by the four agencies.

3. *Analysis of current approaches.*

With this introduction, it is useful to consider the prototype approaches in more detail. It should be noted that the following discussion does not purport to supply definitive interpretations of the statutes discussed. Rather, the purpose is to describe and evaluate prototype approaches to the regulation of chemical carcinogens.

(a) *No risk.* This approach is epitomized by the famous Delaney clause of the Federal Food, Drug, and Cosmetic Act. The clause was enacted in 1958 as part of the Food Additives Amendment, which requires that any food additive be found "safe" before FDA may approve its use in food.[88] The Delaney clause stipulates that this finding cannot be made for a food additive that has been shown to induce cancer in man or in experimental animals. Congress has thus precluded FDA from permitting any level of human exposure to a carcinogenic food additive. The statute does not require, nor has it been interpreted as permitting, FDA to make any further inquiry to determine, e.g., whether some finite level of a carcinogen may be considered "safe enough" in light of the benefits of its use.[89] A similar approach ostensibly is embodied in the provision of the Clean Air Act governing toxic air pollutants.[90]

The "no risk" approach is not typical of federal environmental or health laws. Indeed, the FD&C Act embodies disparate food safety standards. One provision, under which FDA has regulated environmental contaminants of food, directs the agency to consider offsetting factors such as the price and availability of food.[91] Furthermore, the draconian impact of the Delaney Clause has occasionally led FDA to decline to categorize a carcinogen as a food additive, to avoid having to ban a food substance that provides substantial benefits.[92]

---

[87] Legislation explicitly mandating cost-benefit analysis is rare. See *American Textile Mfgs. Inst. v. Donovan*, 452 U.S. 490, 509–12 (1981).

[88] 21 U.S.C. § 348(c)(3)(A).

[89] See Merrill, Carcinogens in Food at 179–184.

[90] Clean Air Act § 112, 42 U.S.C. § 7401 et seq. (1976); *see* National Emissions Standard for Identifying, Assessing, and Regulating Airborne Substances Posing a Risk of Cancer, 44 Fed. Reg. 58641 (1979).

[91] 21 U.S.C. § 346. See Merrill and Schewel, *FDA Regulation of Environmental Contaminants of Food*, 66 Va. L. Rev. 1357 (1980) [hereafter Merrill and Schewel, Environmental Contaminants].

FDA's efforts to escape the Delaney clause illustrate the principal difficulty with a "no risk" approach to regulating carcinogens: its propensity to produce unacceptable results.[93] The clause has been characterized as a categorical cost-benefit judgment by Congress, i.e., a judgment that no food additive is likely to offer benefits sufficient to outweigh any risk of cancer.[94] Recent FDA efforts to regulate such substances as saccharin and nitrite, however, have confirmed the practical limitations of such categorical judgments.[95]

(b) *Negligible risk.* The risk posed by a carcinogen depends on the dose; smaller effective doses present lower risks. It may be possible to reduce human exposure to some carcinogens to so low a level that the associated risk, though greater than zero, is small enough to ignore. Where Congress found such low levels achievable for a class of products, it could direct an agency to allow their use if any associated risk were extremely small, without requiring the agency to take into account control costs.

No current health law mandates such a "negligible" or "insignificant" risk approach. FDA has, however, adopted it administratively for three classes of products.[96] FDA's approach represents an administrative effort to interpret delphic legislative instructions in light of rapidly advancing technology. It is best illustrated by the agency's proposed criteria for regulating carcinogenic animal drugs under a 1962 exception to the Delaney clause.[97] To understand FDA's approach, one must be familiar with this exception.

After 1958, the Food Additives Amendment was interpreted as prohibiting the approval, for use in animals produced for human food, of any drug that had been shown to cause cancer; this was a "food additive" use barred by the Delaney clause. In 1962 Congress amended the Delaney clause to permit FDA to approve the use of a carcinogenic animal drug if the agency were convinced that "no residue" of the substance would be "found" in edible tissues of the treated animals.[98] The amendment specified that FDA was to prescribe the analytic method for verifying the absence of residues. On its face, this amendment could be viewed simply as a clarification of the pre-1962 law: No carcinogenic "food additive" could be approved, but if a substance did not remain in human food, the policy of Delaney did not preclude its approval. Progressive improvements in analytical chemistry have since confirmed that no animal drug is entirely eliminated; a few molecules will always remain in the animals even if they escape detection by existing analytical methods. FDA recognized, as the statutory language suggested, that the issue was the detection, not the occurrence, of residues. It became obvious that sooner or later some analytical method would be capable of identifying residues of *any* drug administered to food producing animals.[99]

---

[92] See R. Kingham, *Statutory and Administrative Theories by Which FDA Avoids Applying the Delaney Clause* (Nov. 10, 1977); Merrill, Carcinogens in Food.

[93] Examples arguably include FDA's attempted ban of saccharin, its successful banning of cyclamate, and the threatened elimination of sodium nitrite as a food preservative.

[94] Merrill; *Regulation of Toxic Chemicals*, Book Review, 58 Tex. L. Rev. 463, 474 (1980).

[95] *See*, e.g., Crandall and Lave, eds., *The Scientific Basis of Health and Safety Regulation* 117–170 (1981); Lave, *The Strategy of Social Regulation* 11–13 (1981).

[96] These are animal drugs, hair dyes, and contaminants of color additives. In addition, the agency has reportedly contemplated the same approach for indirect food additives. *See* Policy for Regulating Chemicals in Food and Color Additives, 47 Fed. Reg. 14464 (1982); Merrill and Hutt at 497.

[97] *See* Merrill, Carcinogens in Food at 227–235.

[98] *See* 21 U.S.C. § 360b(d)(1)(H); Merrill, Carcinogens in Food at 227 *et seq.*

To escape this inexorable conflict, FDA has proposed criteria for approving methods to search for drug residues.[100] The agency proposed that any analytical method approved for controlling a carcinogenic drug be capable of measuring residues presenting more than an "insignificant" risk of cancer. And it went further to specify, as a quantitative measure of "insignificance," a 1 in 1,000,000 lifetime risk of cancer. If a drug sponsor provided a detection method capable of measuring residues posing any greater risk,[101] FDA in effect said it would ignore residues presenting a lower risk.[102]

FDA has followed or considered essentially the same approach for other classes of products. It has approved a carcinogenic color additive used in hair dyes on the premise that the cancer risk associated with any amounts absorbed through the scalp, as estimated by quantitative risk assessment, will not exceed 1 in 1,000,000.[103] And it is considering adopting the same standard for controlling both indirect food additives, e.g., packaging materials, and trace contaminants that are often unavoidable by-products of the processes used to make direct food and color additives.[104] In the latter two cases human exposure to the carcinogenic material is undesired; rather it is the result of the material's use for other purposes.[105]

FDA's "insignificant risk" approach differs from the Delaney Clause because it contemplates that humans may knowingly be exposed to some quantity of a carcinogen. The approach also differs from the various trade-off approaches discussed below in that it does not require the agency to weigh factors other than the substance's carcinogenic potency and the ability of analytical chemists to measure residues, i.e., to control exposure.[106] The approach does not ignore the accepted premises of carcinogen regulation, but neither does it force the agency to evaluate consequences, such as direct control costs or forgone economic benefits, that might logically prompt a decision not to restrict exposure to a carcinogen.

---

[99] *See Hess & Clark v. FDA*, 495 F.2d 975 (D.C. Cir. 1974), analyzed in Merrill and Hutt at 485 *et seq*.

[100] The agency first published its proposal in 1973, 38 Fed. Reg. 19226, and final regulations in 1977, 42 Fed. Reg. 10412. These regulations were set aside on procedural grounds and a new proposal was published in 1979.

[101] Chemical Compounds in Food-Producing Animals: Criteria and Procedures for Evaluating Assays for Carcinogenic Residues, 44 Fed. Reg. 17070 (1979).

[102] This is not literally true, but functionally accurate. The 1979 proposal made clear FDA would not adopt more sensitive assay methods as they were developed if existing methods could detect any residues of concern.

[103] 45 Fed. Reg. 72112 (1980).

[104] *See* Food Chemical News, April 7, 1980; *see also* Merrill and Hutt at 95.

[105] In this respect, the substances are like pesticide residues. Lead acetate, on the other hand, is the essential ingredient in hair dyes marketed for persons who are concerned about greying hair.

[106] See Diethylstilbestrol: Withdrawal of Approval of New Animal Drug Applications; Commissioner's Decision, 44 Fed. Reg. 54852 (1979); Merrill, Carcinogens in Food at 234.

FDA's "insignificant risk" approach does, however, have limitations. First, its implementation depends on the availability of data concerning the potency of a carcinogen. This is not an insuperable problem for FDA, because the agency can insist that a drug's sponsor conduct the testing necessary to generate the necessary data.[107] But agencies responsible for regulating chemicals whose occurrence is not intentional lack comparable leverage. Second, FDA's approach requires the selection of one or more quantitative methods for estimating the cancer risk associated with low doses of a carcinogen.[108] Most important, as a practical matter, a "negligible risk" approach can work only where human exposures to a carcinogen are naturally low. When human exposure is the byproduct of cattle production or the use of food packaging materials or dermatological products, it may be possible to achieve very low effective doses without major sacrifice. But in many contexts humans are exposed to much higher levels, e.g., in the workplace, which cannot be easily reduced.

(c) *Trade-off approaches*. This heading embraces a variety of legal formulas that have important operational differences but one common feature: each requires the regulatory agency to investigate and weigh factors in addition to the health risk posed by substances targeted for regulation. These factors offset the desire to eliminate exposure to substances that increase the risk of human cancer. Three current laws illustrate the variety of trade-off approaches, as well as their difficulties.[109]

(i) *OSHA's "feasibility" standard*. In setting workplace health standards for toxic materials, OSHA is directed to select the standard "which most adequately assures, to the extent feasible . . . that no employee will suffer material impairment of health or functional capacity."[110] On the premises described above, assurance that "no employee" would get cancer would require eliminating exposure to any carcinogen. Historically, however, OSHA has considered two offsetting factors. It has interpreted the "feasibility" standard as requiring it to consider the availability of technology for reducing exposure, and the financial ability of the responsible industries to pay for the necessary controls.[111] At the same time, the agency has declined to take into account the financial survival of individual firms, and it has expressly refused to balance the health benefits of mandated exposure controls against the total costs of achieving them.[112]

---

[107] *See* 21 C.F.R. §§ 348, 360b (1976).

[108] It would be possible for an agency to use several different methods to illustrate the range of possible risks, or select the one in each case which yielded the highest estimated risk. But adherence to some method is a precondition to this approach.

[109] There are other such laws. See OTA Report at 178–179.

[110] 29 U.S.C. § 655 (b)(5) (1976).

[111] *See American Textile Mfrs. Ass'n v. Donovan*, 452 U.S. 490, 495 (1981); Berger and Riskin, *Economic and Technological Feasibility in Regulating Toxic Substances Under the Occupational Safety and Health Act*, 7 Ecology L.Q. 285 (1978).

[112] *See Industrial Union Dept., AFL-CIO v. Hodgson*, 499 F.2d 467 (D.C. Cir. 1974).

Readers familiar with OSHA's health standards program will recall the controversy engendered by its interpretation of the Occupational Safety and Health Act.[113] This controversy twice came to the Supreme Court. On the first occasion, the Court ruled that before ordering reductions in worker exposure to a toxic chemical, OSHA must show that existing levels posed a "significant" health risk.[114] In the second case challenging OSHA's standard for cotton dust, a non-carcinogen, the Court rejected claims that the agency is required to balance compliance costs against health benefits.[115] The result of these two rulings is to establish a two-tiered formula for regulation. OSHA must initially find that the risk posed by a toxic material is significant; once past that threshold it need only consider the technological feasibility and affordability of new controls.

(ii) *FDA's "avoidability" standard.* In addition to regulating substances used as ingredients in fabricated foods, FDA controls human exposure to substances that contaminate agricultural commodities as the result of industrial accident or environmental exposure. Prominent examples include mercury in seafood, PCBs in poultry and fish, and aflatoxins on peanuts. The applicable statute specifies that the agency "shall" establish tolerances for added poisonous substances that are "unavoidable through good manufacturing practices."[116] This provision does not direct FDA to eliminate contaminants or require their reduction to the level necessary to assure that no consumer will suffer harm. Rather, it instructs the agency to set tolerances that take into account both the objective of protecting health and the extent to which contaminants can be avoided. Since most contaminants cannot be reduced without rendering food unmarketable, the decision for FDA is how much contamination to allow.[117]

To answer this question, FDA evaluates the effects of different potential tolerance levels on the price and availability of contaminated food.[118] For example, FDA has declined to order the destruction of all peanuts containing detectable levels of aflatoxin, a potent carcinogen, because of the economic importance of this commodity.[119] Thus, in regulating carcinogenic contaminants, FDA has moderated its search for safety by weighing other values. The agency has insisted publicly that it will not take into account effects on the economic well-being of food producers[120] and it has declined to weigh such "secondary economic effects" of regulation as the impact of its PCB tolerance on interests dependent on sport fishing in the Great Lakes area.[121] The levels of contamination that the agency permits, however, often are high enough to reflect consideration of these values.

---

[113] *See generally*, J. Morran, *OSHA After Ten Years* (paper prepared for AEI Conference on Health, Safety, and Environmental Regulation, November 18–19, 1981).

[114] *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 488 U.S. 607 (1980).

[115] *American Textile Mfrs. Ass'n v. Donovan*, 452 U.S. 490 (1981).

[116] 21 U.S.C. § 346. See also Merrill and Schewel, *Environmental Contaminants*.

[117] *Id.* at 1379–82.

[118] *Id.* at 1380.

[119] *Id.* at 1403 et seq.

[120] *Id.* at 1992–98; see also Poisonous or Deleterious Substances in Food, 39 Fed. Reg. 42743 (1974).

[121] Polychlorinated Biphenyls; Residues in Human Food, 44 Fed. Reg. 38330 (1979).

(iii) *EPA's "unreasonable adverse effects" standard.* The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[122] requires that any pesticide must be registered by EPA before it can be marketed. EPA is directed to refuse or withdraw registration if it finds that use of a pesticide is likely to result in "unreasonable adverse effects on health or the environment."[123] The agency interprets this language as requiring that it weigh all of the effects of a pesticide—its contribution to food production as well as its possible adverse effects on applicators, consumers of food, and the natural environment—in determining whether, or on what terms, to permit registration.[124] EPA has exhibited special concern about pesticides that pose a cancer risk,[125] but it has not taken the position that human exposure must be eliminated regardless of offsetting benefits.[126]

FIFRA comes as near as any statute to requiring a comprehensive evaluation of risks and benefits of a health-threatening activity, but it is not unique.[127] EPA's experience in administering FIFRA illustrates both the virtues and disadvantages of this approach. Its decisions explore a wide variety of effects of pesticide use and restriction, and usually avoid all-or-nothing outcomes. At the same time, EPA's procedures for evaluating the risks and benefits of pesticide use are more protracted than those of other agencies. For example, before EPA reaches a final decision about continued registration of a potential carcinogen, it consults with an in-house scientific group,[128] solicits the advice of the Department of Agriculture and a statutory advisory committee,[129] provides at least two opportunities for the submission of written evidence,[130] and often conducts a formal evidentiary hearing that may itself require as long as a year.[131] The complexity of EPA's process is not attributable solely to the decisional criteria it must apply, but the agency's obligation to entertain evidence and argument on the benefits as well as the risks of pesticides is surely a contributing cause.

(d) *Impact of current approaches.* Each of the foregoing approaches is compatible with the prevailing tenets of carcinogen regulation. All four agencies accept the premise that no finite level of exposure to a carcinogen can be considered safe for all individuals.[132] But with the exception of the "no risk" standard of the Delaney Clause, each of these approaches allows human health to be sacrificed to other objectives. For several cancer risks, such as environmental contaminants of food and occupational carcinogens, forbidding exposure is not a realistic option, even though not literally unachievable. But even when it would be relatively easy to eliminate human exposure, e.g., to pesticides and animal drug residues, regulators temporize. It should hardly be surprising that laws designed to protect health also seek to accommodate conflicting social objectives. Experience suggests that the "no risk" approach breaks down whenever the perceived benefits of a product or activity appear substantial. The "negligible risk" approach is similarly limited because it demands that exposure levels be extremely low. As will be evident, however, the more appealing "tradeoff" approaches themselves entail significant costs.

---

[122] 7 U.S.C. §§ 135–136 (1976).

[123] 7 U.S.C. § 135a (c)(5).

[124] *See Regulations for the Enforcement of the Federal Insecticide, Fungicide, and Rodenticide Act*, 40 Fed. Reg. 28242 (1975); see also 45 Fed. Reg. 52628 (1980) (proposed revisions).

[125] 40 Fed. Reg. 28242, 28265 *et seq.* (1975). See, *e.g.*, *EDF v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1970); *EDF v. EPA*, 510 F.2d 1292 (D.C. Cir. 1975); *EDF v. EPA*, 548 F.2d 998 (D.C. Cir. 1977).

[126] It is uncommon, however, for EPA to sanction continued use on food crops of a pesticide that has been shown to be carcinogenic.

[127] See OTA Report at 178; Toxic Substances Control Act, 15 U.S.C. §§ 2601–2629 (Supp. III 1979).

[128] This is the Cancer Assessment Group. See conversation with Elizabeth Anderson, Director, EPA Cancer Assessment Group, Oct. 13, 1981.

[129] See 7 U.S.C. § 136d(a).

[130] See 7 U.S.C. § 135d(d).

[131] C. Horne, EPA's August 1980 Proposal: Reforms in the Rules of Practice for Cancellation Hearings at 16–18 (Unpublished paper, January 1982).

4. Agency Programs Studied for Report.

The previous section has provided a typology of legal approaches to regulating carcinogens. This section briefly describes the regulatory programs selected for study, all of which fall within the "trade-off" category. The four programs are FDA's regulation of environmental contaminants of food; CPSC's chronic hazards program; OSHA's regulation of workplace carcinogens; and EPA's regulation of pesticides. Each program will be examined in detail in an independent chapter. The summaries that follow stress the legal standards under which regulatory decisions are to be made and the administrative procedures Congress has prescribed for making them.

(a) *FDA Regulation of food contaminants.* Under the Federal Food, Drug, and Cosmetic Act (FDC Act),[133] FDA is generally responsible for assuring the safety of human food. The statutory provisions that govern this activity are the product of a series of Congressional enactments spanning more than six decades.[134] In consequence FDA evaluates the safety of food under several legal standards which apply to specific categories of foods (e.g., agricultural commodities) or food constituents (e.g., food additives, pesticide residues).

Because of the notoriety of the Delaney clause, it is sometimes assumed that the FDC Act prohibits any carcinogen in human food. In fact, the clause itself applies to relatively few categories of food substances, although FDA has applied the "no risk" policy that it embodies more generally.[135] As often, however, the agency has refrained from interpretations of the Act that would bar the sale of food which contains carcinogens. One example is the category of agricultural commodities, many of which naturally contain constituents that have been shown experimentally to cause cancer.[136] Another is environmentally contaminated food which, as noted above, FDA has regulated under statutory language that enables it to weigh values that in its judgment may override the objective of minimizing the risk of human cancer. It is this program that I have selected for special attention.

---

[132] See IRLG Scientific Principles at 259.

[133] 21 U.S.C. § 321 et seq. (1976).

[134] See Merrill, Carcinogens in Food at 184.

[135] Merrill and Hutt at 55.

[136] *Id.* at 53–56. For a discussion of the number of natural food constituents that have been found carcinogenic in animal tests, see Citizen Petition of the Grocery Manufacturers of America to the U.S. Food and Drug Administration (August 20, 1981), at 25–27 [hereafter GMA Petition].

Environmental contamination is a significant source of toxicants in food. Contaminants occur unavoidably in the harvesting or production of many commodities, such as grains, milk, and fish. Many of these substances are carcinogenic. Under section 406 of the FDC Act[137] FDA is empowered to establish tolerances for food contaminants—even carcinogens—if they cannot be avoided by good manufacturing practice. In addition to considering public health, the agency has taken into account a variety of values, including the cost of implementing more rigorous controls and the impact of lower tolerances on the availability and price of food. It has also given weight to a third criterion: the ability to measure the contaminant. The agency cannot enforce a tolerance below the level that the best practicable method of chemical analysis can detect.

The FDC Act prescribes on-the-record rulemaking for establishing tolerances for food contaminants.[138] Because of the costs of this procedure, however, FDA has usually eschewed formal tolerances and instead announced "action levels"—contamination levels that will cause the agency to initiate court enforcement under the general adulteration provisions of the Act.[139] These action levels thus operate as informal tolerances, and FDA sets them by considering the same criteria as are prescribed by section 406. Action levels are not, however, the product of public rulemaking.

(b) *CPSC regulation of chronic hazards*. Of the four agencies studied, the Commission has played the smallest role in Federal efforts to control exposure to toxic chemicals. The agency was established by the consumer Product Safety Act of 1972,[140] with authority to regulate consumer products that pose an "unreasonable risk of injury or illness." Consumer products include all articles sold for general or personal use in the home, school, or recreational settings, apart from products regulated by FDA, tobacco, and certain other items.[141] The CPSC also administers the older Federal Hazardous Substances Act.[142] Together, these statutes give the agency two primary tools for controlling human health hazards: the power to prescribe mandatory performance and labeling standards for consumer products; and the power to ban products whose risks cannot be adequately controlled through such requirements.[143]

---

[137] 21 U.S.C. § 346 (1976).

[138] 21 U.S.C. § 371(e) (1976).

[139] Specifically, section 401(a)(1), 21 U.S.C. § 341 (a)(1). See Merrill and Schewel, *Environmental Contaminants* at 1382.

[140] 15 U.S.C. § 2051 et seq. (1976 and Supp. III 1979), as amended.

[141] 15 U.S.C. § 2052 (a)(1) (1976).

[142] 15 U.S.C. § 1261 et seq. (1976).

[143] Under section 15 of the CPS Act, the Commission also has the power, after an evidentiary hearing, to order the repurchase, recall, or making of refunds for, any consumer product that presents a "substantial hazard." 15 U.S.C. § 2065 (1976). Under the shadow of this authority, the agency has forced manufacturers to cease distribution of many assertedly hazardous products including ones which ostensibly posed a risk of cancer (hairdryers containing asbestos). This authority has been used only once to regulate a carcinogen.

Section 8 of the CPS Act authorizes the Commission to ban a consumer product if it finds that “no feasible . . . standard . . . would adequately protect the public from [an] unreasonable risk of injury.”[144] The FHSA empowers the CPSC to regulate products that are “toxic,” defined by Congress as having the capacity to produce personal injury or illness through ingestion, inhalation, or absorption.[145] While the FHSA is primarily a labeling statute, it also authorizes the Commission to ban any hazardous substance that presents so serious a hazard that “the objective of the protection of the public health and safety can be adequately served only by keeping such substance . . . out of the channels of interstate commerce.”[146] The agency has relied on both statutes to eliminate carcinogens from consumer products.

In assessing the need for a product safety rule or ban for a potentially hazardous consumer product, the CPSC is required by statute to weigh the degree and nature of the risk, the number of consumer products affected, consumer needs, and alternative methods for minimizing the risk.[147] The legislative history of the CPS Act indicates that the CPSC should balance the likelihood that a product will cause harm and the gravity of such harm against the effect of regulation on the product's utility, cost, and availability to consumers.[148] Recent court cases hold that this formula requires a balancing of economic cost and health benefits.[149] The FHSA makes clear that before banning a potentially hazardous product, the Commission should explore the less stringent alternative of labeling, but it does not specify what weight the agency should accord factors other than the risk to health in deciding whether a ban is appropriate.[150]

While neither statute mentions the risk of cancer, since 1975 the Commission has devoted special attention to chronic health hazards. In 1978 the agency announced its intention to prevent known carcinogens from being intentionally added to consumer products if they could be absorbed, inhaled, or ingested into the human system.[151] Under this policy, use of any carcinogenic substance would be phased out unless no reasonable substitute were available and elimination of the substance would result in “unacceptable” economic and social costs. In the latter event CPSC would require reduction of the substance to the lowest attainable level until a substitute is identified. While the CPSC's formal policy was set aside on procedural grounds,[152] the approach it announced continued generally to reflect agency philosophy.

Whether proceeding under the CPS Act or the FHSA, the CPSC has the burden of justifying any restriction on the marketing of a product. The law does not obligate manufacturers to notify the Commission of their plans to market new products or to obtain prior approval for any design or constituent. The CPS Act prescribes the same procedures for adopting a consumer product safety standard and for banning a product, i.e. quasi-formal rulemaking.[153] When seeking to ban a substance under the FHSA, however, the Commission must follow the formal rulemaking procedures set forth in section 701 of the FDC Act.[154] Because such rulemaking is likely to be protracted, the agency customarily proceeds under the CPS Act.[155]

---

[144] 15 U.S.C. § 2057(d) (1976).

[145] 15 U.S.C. § 1261(g) (1976).

[146] 15 U.S.C. § 1261(g)(1) (1976).

[147] 15 U.S.C. § 2058(c) (1976).# 148. See Merrill, *CPSC Regulation of Consumer Products Posing a Risk of Cancer* 1972–1981, 67 Va. L. Rev. 1261, 1279–80 (1981) [hereafter Merrill, Consumer Products].

[149] See *Aqua Slide' n Dive v. CPSC*, 569 F.2d 831 (5th Cir. 1979).

[150] Merrill, Consumer Products at 1290–95.

[151] 43 Fed. Reg. 25658 (1978). See Merrill, Consumer Products at 1297–1300.

[152] See *Dow Chemical, U.S.A. v. CPSC*, 459 F. Supp. 378 (S.D. La. 1978).

(c) *OSHA regulation of workplace carcinogens*. OSHA's efforts to limit worker exposure to toxic chemicals have helped make it one of the most controversial federal agencies.[156] The agency's statute, the Occupational Safety and Health Act of 1970 (OSH Act),[157] subjects employers to two primary obligations: (1) a general duty, enforceable administratively, to provide employment that is "free from recognized hazards that are . . . likely to cause death or serious physical harm . . .";[158] and (2) the obligation to comply with safety and health standards, which constitute the primary means by which OSHA has attempted to limit worker exposure to toxic chemicals. The OSH Act specifies that, in controlling worker exposure to a toxic material, OSHA shall prescribe the standard "which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or physical capacity. . . ."[159]

The criteria OSHA must follow in setting health standards are a product both of statutory language and judicial interpretation. The courts of appeals have acknowledged OSHA's broad discretion to prescribe standards even in the absence of definitive evidence on health effects.[160] The Supreme Court, however, has held that OSHA must show, by substantial evidence, that current exposure to a substance poses a "significant" health risk before it can order new controls.[161] The agency has consistently acknowledged that it must take into account whether particular safeguards are technologically and economically "feasible," but simultaneously insisted that a "feasible" standard may mandate the development of new technology or even force some firms out of business. This view has now been essentially endorsed by the Supreme Court, which agreed that OSHA is not obligated to show that the health "benefits" of a standard are worth the cost.[162]

---

[153] 15 U.S.C. § 2058(d)(2).

[154] 21 U.S.C. § 371(e), incorporated by reference in 15 U.S.C. § 1261(g)(2).

[155] Merill, Consumer Products at 1289–90.

[156] See, e.g., Nichols and Zeckhauser, *Government Comes to the Workplace: An Assessment of OSHA*, 54 Pub. Int. 39, 55–57 (1979).

[157] 29 U.S.C. § 651 et seq. (1976).

[158] 29 U.S.C. § 654 (2) (1976).

[159] 29 U.S.C. § 655(b)(5) (1976). See *American Textile Mfgrs. Institute v. Donovan*, 452 U.S. 490 (1981).

[160] See *Industrial Union Dept., AFL-CIO v. Hodgson*, 499 F.2d (D.C. Cir. 1974); see also Berger and Riskin, *supra*, note 119.

[161] *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980).

[162] *American Textile Mfrs. Ass'n v. Donovan*, 452 U.S. 490 (1981).

In early 1980, OSHA formally promulgated criteria for identifying, classifying, and regulating potential carcinogens.[163] A major objective was to forestall relitigation of basic scientific principles in individual standard-setting proceedings. The agency simultaneously established a system under which it would rank individual chemicals as candidates for regulatory action based on the strength of the evidence of their carcinogenicity.[164] This novel experiment in generic rulemaking is examined in Part II of this report.

OSHA has the burden of initiating action to control worker exposure to carcinogens; no employer need obtain prior approval for any workplace condition or practice or, as a legal matter, test new materials before introducing them. The procedure for establishing permanent health standards is a variety of quasi-formal rulemaking, which provides a public hearing as well as the opportunity to submit written comments. Hearings are conducted before an Administrative Law Judge, and witnesses are ordinarily subject to questioning by other participants.[165] By contrast with the CPSC's rulemaking hearing, those at OSHA may consume several weeks.

(d) *EPA regulations of pesticides.* EPA regulates the marketing and use of pesticides and shares with FDA responsibility for regulating pesticide residues on food. Pesticide legislation ranks among the oldest Federal laws designed to control chemical hazards.[166] The current law, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),[167] was enacted in 1947 but has experienced major amendment in 1964 and on three different occasions in the 1970's.[168] Under FIFRA no pesticide may be marketed unless it has been registered, i.e., licensed, by EPA. Section 3 of FIFRA specifies that a pesticide shall be registered if its composition and labeling meet the Act's requirements, it will perform its intended function, and "when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment."[169] The statute further defines the criterion "unreasonable adverse effects on the environment" as "any unreasonable risk to man or the environment, taking into account the economic, social and environmental costs and benefits of the use of any pesticide."[170] Thus, in determining whether to register a pesticide, EPA must balance its health and environmental risks against the benefits of its use.

---

[163] Identification, Classification, and Regulation of Potential Occupational Carcinogens, 45 Fed. Reg. 5001 (1980) [hereafter OSHA Carcinogen Policy].

[164] *Id.* at 5205–07. This portion of OSHA's so-called "generic cancer policy" has been stayed as the agency, under new management, has invited further public comment on the 1980 regulations. 46 Fed. Reg. 187 (1982).

[165] See R. Merrill, *OSHA Regulation of Occupational Carcinogens* 27–30, Chapter 4 of Federal Regulation of Cancer-Causing Chemicals, a report to the U.S. Administrative Conference (Draft, October 1980) [hereafter OSHA Draft].

[166] The first federal pesticide legislation was enacted in 1910, four years after the 1906 Food and Drugs Act. See generally, Merrill, EPA Regulation of Carcinogenic Pesticides 2, Chapter 5 of Federal Regulation of Cancer-Causing Chemicals, a report to the U.S. Administrative Conference (Draft, August 1981) [hereafter EPA Draft].

[167] 7 U.S.C. §§ 135–136 (1976 and Supp. III 1979).

[168] EPA Draft at 14.

[169] 7 U.S.C. § 136a(c)(5)(D).

[170] 7 U.S.C. § 136(bb).

To aid in determining whether a pesticide poses "unreasonable adverse effects," EPA has, by regulation, established a series of "rebuttable presumption[s] against registration."[171] EPA's announcement of a rebuttable presumption or RPAR for a pesticide sets in motion an elaborate public process, consisting of two opportunities for written submissions, consultation with an advisory committee, and sometimes a formal evidentiary hearing to determine registrability. EPA has used the RPAR process primarily in conjunction with its review of pesticides registered many years ago under less stringent standards than the current law imposes. Under EPA's regulations a rebuttable presumption against registration arises if a pesticide exceeds criteria for any of three types of risks: acute toxicity; lack of emergency treatments for exposed humans; or chronic toxicity.[172] With respect to the latter risk, EPA regulations specify that a presumption against registration arises if a pesticide "induces oncogenic effects in experimental mammalian species or in man as a result of oral, inhalation or dermal exposure. . . ."[173]

EPA has also published criteria for assessing whether any agent within its jurisdiction poses a cancer risk to humans.[174] The criteria recognize four grades of evidence of potential harm carcinogenicity ranging from the "best evidence" (consisting of epidemiological studies in humans in conjunction with confirmatory animal tests), through "substantial evidence" (consisting of animal tests that demonstrate tumor induction), to least persuasive "ancillary evidence" (consisting of studies that relate chemical structure to carcinogenicity).[175] Even if a pesticide were shown by the "best evidence" to be a human carcinogen, however, FIFRA theoretically would permit it to be registered if EPA determined that the economic benefits of its use outweighed the health risk.[176]

EPA's regulation of pesticides is the only one of the four programs studied that incorporates a premarket clearance feature. Before the agency will approve a pesticide, the applicant must submit evidence of its efficacy, its environmental chemistry, and its degree of hazard to humans, domestic animals, and nontarget organisms.[177] Most of the data underlying EPA's decisions are provided by pesticide sponsors, and its regulations state emphatically that the burden of proving that a pesticide will not cause "unreasonable adverse effects" rests at all times on the registrant.[178]

---

[171] 40 C.F.R. § 162.11 (1981). These regulations, first promulgated in 1975, were an attempt to orchestrate public debate over the risks and possible offsetting benefits of hazardous pesticides outside the context of a formal evidentiary hearing. See 40 Fed. Reg. 28281 (1975).

[172] 40 C.F.R. § 162.11(a)(3) (1981).

[173] *Id.* at § 162.11(a)(3)(ii).

[174] 40 Fed. Reg. 21402 (1976). The criteria appeared in the "Notice" portion of the Federal Register, not as regulations. They outline a "weight of the evidence" approach to evaluation of suspect compounds, rather than purporting to accord decisive weight to particular test findings.

[175] *Id.* at 21404.

[176] There are few examples of such decisions, but they do exist. EPA has very rarely allowed continued use of a carcinogenic pesticide on human food crops which might bear residues that consumers would ingest. On the other hand, EPA has more often continued to permit marketing and use of carcinogenic agents where only applicators have any risk of exposure.

[177] 7 U.S.C. § 136a(c).

The statutory procedure for pesticide registration—and cancellation—resembles formal adjudication and includes an opportunity for a formal evidentiary hearing.[179] Hearings are never demanded when EPA denies initial registration, but registrants are very likely to insist on a formal hearing when the agency attempts to cancel registration of products already in use. EPA's formal decisionmaking process, accordingly, is the most elaborate of those examined in this study.

D. *Regulatory Assessment of Risk*

1. *Overview.*

The first stage of any decision to regulate a potential carcinogen is an assessment of the health risk it poses. Determining risk to health is the central element of most decisions by the agencies studied and it would be a major part of any cost-benefit assessment. Harm to human health is the most notable adverse consequence of allowing exposure to a carcinogen; the principal "benefit" of regulating exposure can therefore be expressed in terms of reduced likelihood of cancer.

Assessing the health risk posed by a substance routinely involves at least two, and often three, stages of fact-finding and analysis.[180] The risk posed is a function of the chemical's ability to cause harm and the type and extent of human exposure to the chemical. The manner of exposure can be important because only certain types or routes of exposure may be capable of causing harm. The level of exposure is important because a substance may be harmful only when ingested or inhaled in large quantities or for long periods. Even if a substance is capable of causing harm at very low exposure levels, determining actual levels of exposure is important in assessing both the size of the risk presented and the controls that can be achieved.

The initial step in risk assessment is to make a qualitative judgment about a chemical's carcinogenicity.[181] In deciding whether a chemical is capable of causing cancer, an agency may draw on four types of evidence: (1) data from epidemiological studies in human populations; (2) the results of experiments involving laboratory mammals; (3) the results of so-called "short term tests" in lower-order organisms, usually bacteria, and (4) comparison of a chemical's structure to the structure of other chemicals whose biological activity is well-established. Since only one of these types of data involves exposures of primary interest, *i.e.*, human exposures, the appropriateness of extrapolating other types of evidence to humans is a persistent issue.

---

[178] 40 C.F.R. § 162.6(b)(2)(B).

[179] 7 U.S.C. § 136d(d).

[180] For a more thorough discussion of the elements of agency decisionmaking, see Part II of this report.

[181] The discovery that a chemical has the capacity to cause cancer has usually been the starting place for regulatory analysis and theoretically is anterior to the other steps. In some contexts, however, an agency may sensibly begin at another point. For example, the CPSC has sometimes focused first on the exposure issue. It has attempted to determine the composition of consumer products whose use could present serious risks if they contained a hazardous material, and then considered whether any of the components are toxic. See Merrill, Consumer Products at 1306–09.

The second step in risk assessment is to determine whether and how humans might be exposed to the chemical. Both facets of this question can be complex. For a chemical used as a food additive, human exposure is easily verified; the substance is intended to be ingested by humans. For many chemicals, however, human exposure is not desired, and in some cases may be unexpected. The exposure of milk drinkers to pesticides used on oranges whose rinds become forage for dairy cattle is an example.[182] Confirming *that* exposure occurs is only part of the inquiry, however, for humans may not encounter the chemical in a way that permits absorption or by the route shown experimentally to cause cancer.[183] Furthermore, the quantity of a substance that is encountered and absorbed, i.e., the effective dose, will decisively influence the magnitude of risk but is often difficult to determine.

A third step in risk assessment is to determine the magnitude of the cancer risk associated with predicted exposures to a carcinogen. As observed earlier, this step may not be a prerequisite to regulation. For example, in deciding whether to ban a food additive FDA under current law need know only that the additive induces cancer in laboratory animals or in humans; it need not measure the level of use or determine whether the risk is large or small.[184] In many programs, however, a qualitative determination of carcinogenicity is not a sufficient basis for regulation;[185] some agencies may be required to quantify the risk associated with exposure to a carcinogen. If an agency is required to consider other offsetting values, quantification of the risk assumes added significance. Some attempt to gauge the magnitude of the risk posed by a chemical has thus become a common, if not routine, step in regulatory risk assessment.[186]

The following sections explore in more detail the sources of information and the types of analyses that agencies rely on in assessing the health risks of potential carcinogens.

2. *Epidemiological Studies.*

a. *Background.* Among methods for detecting environmental hazards to human health, epidemiology ostensibly is the most powerful and yet often the least revealing. This dichotomy is sharpest in the case of diseases that become manifest only long after primary exposure, of which the clearest example is cancer.

---

[182] See NAS, Regulating Pesticides 166–74 (1980).

[183] That human exposure is by a different route does not negate the existence of human hazard, but it does pose an additional issue to be resolved in evaluating the degree of hazard. See FDA's discussion of the risk posed by lead acetate in hair dyes, 44 Fed. Reg. 12205 (1980).

[184] *See* text accompanying notes 89–95 supra; Food, Drug, and Cosmetic Act § 409(c)(3)(A), codified at 21 U.S.C. § 348 (1976); Merrill and Hutt at 77–78. It may do so, of course, for other purposes. In proposing its ban of saccharin, for example, FDA presented a fairly lengthy analysis of the exposure issue. See 42 Fed. Reg. 1996–2010 (1977).

[185] For example, the Supreme Court's ruling that OSHA must find risk "significant" before it can establish a standard is thought by many observers to require quantification. See *Industrial Union Dep't, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980).

[186] See text accompanying notes 285 et seq. *infra*.

"Epidemiology" embraces a variety of methods for investigating the occurrence and the causes of human disease at the population level. The methods used in epidemiological research are essentially descriptive rather than experimental, i.e., they gather and interpret data from past or continuing human exposures.[187] Epidemiological studies can provide two useful types of information concerning cancer. First, they help characterize cancer as a disease, helping answer such questions as: Who gets cancer? At what age? Is incidence increasing or decreasing? Second, epidemiological methods can reveal the existence, or more commonly define the likelihood, of strong associations between environmental factors and cancer. Studies designed to derive the latter kind of information are more frequently encountered by regulators.

Epidemiologists gather information describing the diseases experienced by a population and information about the behavior or environment of that population. Their operating assumption is that the two types of information can illuminate the causes of disease. But because epidemiologists cannot manipulate the conditions in which people actually live, they use methods that attempt to deduce causes of cancer from available data that reveal associations between disease and other factors.[188] In addition to searching for associations, epidemiologists are called on to interpret those that are observed. An observed association may reflect nothing more than a chance relationship between the factor and the disease or, at the other extreme, it may signify that the factor itself causes the disease.

In epidemiology, "cause" is defined operationally: An association between a factor and a disease that is "strong enough" is deemed to be causal. Whether an association is strong enough depends not only on its statistical significance but on other, nonquantitative criteria. For example, the appearance of the disease must follow the occurrence of, or exposure to, the putative cause. The absence of other more convincing explanations for the association is also supportive. Most important, the assertion of a causal relationship must be consonant with existing knowledge about how the disease occurs.

A demonstrated association between exposure to a chemical and an increased incidence of a type of cancer would be itself be only weak evidence of a causal relationship. The inference is, however, strengthened by general acceptance of a mechanism by which some chemical exposures can lead to the appearance of cancer. The prevailing theory of chemical carcinogenesis hypothesizes a chemical interaction with mammalian cells, in which they are altered from a normal to a cancerous state. A strong association between a type of cancer and exposure to a specific chemical may therefore be evidence that the chemical is a cause of that type of cancer. The probative force of such an association is a function of two criteria. One is how well the characteristics of the observed association fulfill the biologically-based expectations of causal relationship. The other is the compatibility of the observations with other possible explanations for the associations. For reasons described below, available human data ordinarily are not adequate to establish conclusively such causal relationships; neither are capable of ruling out specific chemicals as causes of human cancer.[189]

---

[187] The epidemiologist often starts from a hunch, perhaps suggested by medical experiments or by a preliminary review of existing data, about what environmental factors might influence the appearance of cancer. He then analyzes the data, trying to discern associations that are consistent with the suspected relationships between factors and diseases. Convincing demonstrations of association require accurate observations of both disease incidence and other potentially casual factors. Although the data available to epidemiologists are often voluminous, they are rarely satisfactory. OTA Reports at 136–140.

[188] *Id.*

b. *Standard approaches*. Epidemiologists follow two basic approaches in investigating the connection between environmental insults and cancer: cohort studies and case-control studies.[190] Cohort studies, which may be either prospective or retrospective, compare the health histories of groups of individuals who differ in their exposure to the chemical under study. For example, a retrospective cohort study might compare the health histories of workers in a shipbuilding facility that used asbestos insulation to the histories of other workers who had no exposure to asbestos.[191] To the extent possible, workers would be subdivided according to their level of exposure to asbestos. The incidence of lung cancer among workers in each group would be compared to identify associations between the level of asbestos exposure and the occurrence of disease. A cohort study can convincingly attribute the differences in cancer rate to asbestos exposure only if all of the cohorts are well matched with respect to other variables, *e.g.*, sex, occupation, age, and exposure to other carcinogens such as cigarette smoke, that may influence the incidence of the disease. This ideal is very difficult to achieve.

The second common format is the case-control study. Such a study begins with the identification of individuals who suffer from a disease. These "cases" are then compared with matched "controls," i.e., individuals who do not have the disease, to determine whether there are notable differences in exposure to suspect agents. As in cohort studies, the objective of the case-control approach is to minimize the effect of confounding variables so that any differences in cancer rates can be correlated with chemical exposure.[192]

---

[189] The reliability of a finding of a causal relationship between exposure to a substance and cancer is obviously important to environmental regulation. For only if a substance in some way contributes to the development of cancer can its elimination or reduction affect the incidence of the disease.

[190] See OTA Report at 138; OSHA Carcinogen Policy at 5038.

[191] See the discussion of OSHA's health standard for asbestos, OSHA Draft at 125–32; M. Shapo, *A Nation of Guinea Pigs* 191 et seq. (1979).

The reliability of the conclusions from either cohort or case-control studies depends on the closeness of the match between the compared groups, the accuracy of exposure and disease incidence data, and the statistical limits of detecting differences in disease incidences between groups. The case-control format has particular appeal for the study of possible chemical carcinogens because the expected incidence of most cancers is low. The probative weight of findings from such a study depends on whether the investigator has identified a control population that closely matches the cases. Selecting matched controls requires informed guesses about the factors that could affect disease incidence, to which individual exposure may often be impossible to verify.[193]

Epidemiologists confront three main problems: detection of disease frequencies; recordation of exposure histories; and discernment of linkages between them. The North American data base lags well behind modern needs to describe the health effects of environmental agents. The decentralized, predominantly private U.S. health care system does facilitate uniform data gathering as readily as do state systems.[194] The classical uncertainties of disease recording—inaccuracies in mortality and morbidity classification—are thus exacerbated by the lack of a uniform national reporting system. Data gathering is also impeded by the mobility of the U.S. population, which produces frequent changes in dietary and exposure patterns and discontinuities in medical records. The probable costs of more accurate and comprehensive health records, furthermore, are very high, particularly if this requires a large fraction of deaths to be followed by autopsy.[195]

---

[192] For example, the case-control study of the relationship between saccharin consumption and bladder cancer first identified a population of individuals with bladder cancer. The cases were matched with a group of individuals with similar characteristics who did not have bladder cancer. Saccharin consumption in the two groups was determined, often retrospectively, using a sophisticated interview process, and then compared. A large case control study of artificial sweeteners and bladder cancer has concluded that the general population who reported having used artificial sweeteners were at no higher risk of bladder cancer than those who did not. The study, however, did detect an increased rate of bladder cancer among certain subgroups studied. Hoover and Strasser, *Artificial Sweeteners and Human Bladder Cancer*, 1980 *Lancet* 837. An apparent association between coffee consumption and pancreatic cancer was also demonstrated in a case-control interview study. The coffee drinking habits of 369 patients with pancreatic cancer were compared with those of more than 600 controls, who in this study were patients hospitalized for other reasons. See B. MacMahon, 304 N.E. J. of Medicine 63, 633 (1981).

[193] *See* OTA Report at 138.

[194] *Id.* at 15, 142–45.

[195] In addition to these data limitations, a new problem has recently emerged, that of privacy limitations. The thorough disease and exposure profiles that are needed to evaluate environmental hazards require monitoring of identifiable individuals to an extent unprecedented in American history. This problem is both technological and political. Its technological side involves the problem of data security balanced against accessibility; its political aspect involves a choice between personal privacy and reliable assessment of risks to public health. *See* Privacy Protection Study Commission, *Personal Privacy in an Information Society*, (GPO 1977). Although OSHA carcinogen policy requires extensive medical surveillance of employees and provides for a detailed completion of employee medical records, there is no discussion in the OSHA rule of the privacy issues related to the gathering of this information. See OSHA Carcinogen Policy at 5230–34.

Finally, the number of unidentified carcinogens to which individuals are exposed in their daily lives practically defies attempts to control for their effects.

c. *Power and limitations of epidemiological studies.* Roughly two dozen chemicals have been identified as carcinogens in epidemiological studies. The most appealing feature of such studies is the obvious one: they involve human populations. Using data from human experience eliminates the uncertainties that accompany extrapolation of animal test results to humans.[196] Epidemiological studies can also incorporate, albeit at substantial expense, very large populations, which are not practical in animal experiments.[197] A large population extends the lower range of detectable effects and enhances the statistical significance of observed associations.

The successful demonstration that cigarette smoking is associated with lung cancer illustrates the power as well as the significant limitations of epidemiology. Suggestions in the late 1940's that cigarette smoking might cause lung cancer triggered attempts by both experimental researchers and epidemiologists to verify the hypothesis. But even extended laboratory efforts were largely unsuccessful in demonstrating that animals exposed to cigarette smoke developed lung cancer. By contrast, epidemiologists have been able to mount a strong case that cigarette smoking causes lung cancer in humans.[198]

Early studies compared the incidence of lung cancer in smoking and non-smoking human populations, generally agreeing on three observations: (1) The incidence of lung cancer among heavy smokers was eight to ten-fold higher than among non-smokers. (2) Among groups with differing smoking patterns, increased exposure to cigarette smoke was correlated with lung cancer incidence. (3) The differences in cancer rates between men and women paralleled comparable differences in the proportions who smoked.[199] Having demonstrated a strong association between lung cancer and cigarette smoking, epidemiologists had to interpret these findings. Their conclusion that smoking causes cancer rested on a two-branched rationale: First, the observations were consistent with the expectation that cigarette smoke was a carcinogenic agent. Second, based on the available data, other explanations for these observations did not seem plausible.[200]

---

[196] In addition, the environments in which chemicals have been associated with human cancer are more likely than the controlled setting in which animal experiments are conducted to resemble other human environments.

[197] B. MacMahon, *Epidemiology's Strengths, Weaknesses, in Environmental Health Issues*, 30 National Academy of Services, News Report, No. 4, p. 5 (April 1980).

[198] *See generally* U.S. Public Health Service, *Smoking and Health: Report of the Advisory Committee to the Surgeon General*, Public Health Service Publication No. 1103 (Department of HEW 1964).

[199] *The Health Consequences of Smoking: A Public Health Review*, Public Health Service Report p. 9, (Department of HEW 1967). Epidemiologists have demonstrated an increase in the incidence of lung cancer among women that follows, with the expected lag time of between twenty and twenty-five years, a sharp increase in cigarette smoking among women. These observations have emerged repeatedly in independent studies. *The Health Consequences of Smoking for Women*, Public Health Service Report, pp. 115–116 (Department of HEW 1980).

This description illuminates several features of epidemiological investigation. First, the finding that smoking was *associated* with lung cancer was only the first, and easiest, step. Determining whether smoking *causes* cancer required considerable research to eliminate other proposed explanations by showing that their predicted consequences were inconsistent with the available observations. Experiments were repeated to confirm the reliability of the observations and others were conducted to eliminate alternative explanations, requiring considerable time and expense.[201] More important, these efforts were necessary to detect the effects of an agent that is now blamed for as many as 30 percent of all cancers and a higher percentage of lung cancers; even the best human studies are not capable of discerning modest increases in disease rates caused by exogenous factors—increases of the magnitude likely to be associated with exposure to toxic chemicals.[202]

Accordingly, while epidemiological investigations have illuminated the role of environmental factors in some human diseases, they have played a limited role in identifying health effects of specific chemicals. Their expense alone would preclude routine use of epidemiological studies as a screen for carcinogenic effects. Moreover, epidemiologists can evaluate only those substances to which humans are already exposed; ethical constraints generally preclude nontherapeutic experiments with human subjects.[203] In consequence, the data used in epidemiological studies are often poor. Epidemiologists do not conduct "experiments"; instead, they take human circumstances as they find them and attempt to select from recorded data the information required for a well-designed study of carcinogenicity. Most available data, e.g., from hospital or employer records or death certificates, are at best an imperfect approximation of actual experience. Their deficiencies are particularly evident in cancer studies, which often try to reconstruct conditions that existed many years earlier at the time of initial exposure to a chemical.[204]

---

[200] The evaluation process that supports the latter conclusion in the case of smoking is illustrated by the following dialetic. It was once suggested that other airborne chemicals were inhaled by humans and could have been causes of lung cancer. This explanation was undermined, however, by the finding that men and women, equally exposed to general environmental influences, displayed dramatically different rates of lung cancer. Another alternative, taking into account the differential rates between the sexes, then suggested that men were more susceptible than women and for this reason exhibited higher rates of lung cancer. But this hypothesis did not account for the later observation that the increase in lung cancer among women paralleled in time the rise in the proportion of women who smoked. Thus, despite energetic attempts to suggested other theories, the most convincing, straight-forward explanation for all of the observations remained that smoking causes lung cancer.

[201] It is quite possible that alternative explanations for an observed association between chemical exposure and cancer cannot be convincingly eliminated and that the causal character of the association will remain, after many studies, only one of several hypotheses.

[202] *See* OTA Report at 67; OSHA Carcinogen Policy at 5049.

[203] *See generally*, J. Katz, A. Capron, and E. Glass, *Experimentation with Human Beings* (1972). Compliance with Department of Health and Human Services regulations for human studies is required to obtain federal research funds. These regulations, currently under revision, are authorized by 5 U.S.C. § 301 (1976); 42 U.S.C. §§ 2891–93(a), and appear in 45 C.F.R. Part 46 (1979). It is sometimes possible to design prospective epidemiological studies that will yield information about health effects associated with a new substance as human exposure continues, but this information cannot aid initial decisionmaking. An example of a prospective study on smoking is E. C. Hammond, *Smoking in Relation to the Deaths of One Million Men and Women*, 19 National Cancer Institute Monograph 127 (1966).

d. *Statistical power*. Probably the most important and yet least understood limitation of epidemiological studies is their inability to reveal, or to negate, any but large associations between exposure and disease. This limitation of epidemiological studies is a function of their statistical power.

The hypothesis underlying such studies is that exposure to a substance that causes cancer should increase its incidence. Testing this hypothesis requires comparing the cancer rates in at least two populations. The protocol for making such a comparison is to locate two groups that differ in their exposure to the chemical but are closely matched in all other potentially significant variables. Ordinarily, however, some individuals in the unexposed group, or "controls," will have developed the type of cancer suspected to be caused by the chemical. Only if the incidence of cancer in the exposed group stands out above the "background" incidence in the unexposed group will an association be detected.

Once the investigator has measured the cancer incidence in the two groups, he must decide whether the incidences in fact differ. Successive independent measurements of disease incidence in two similar groups would not be expected to be identical; rather, they should cluster around a mean value. This mean value is likely to approximate the true incidence of cancer in the population of which the measured groups are representative. The crucial question in comparing two groups is whether divergent measurements reflect different incidences or simply chance fluctuations about the same mean. Some sets of measurements are better able in a probabilistic sense than others to reveal whether different measured incidence values represent real differences. This property of discrimination, more precisely the likelihood of obtaining a statistically significant measure, is termed statistical power.[205] In a study that possesses high statistical power, differences in measured cancer incidence between the exposed and unexposed groups can be confidently interpreted to mean that the true incidences actually differ. In general, studies that reveal only a relatively low excess incidence of cancer in the exposed group have low power and are less capable of discerning small actual differences between two groups. Because the increases in risk expected from low-dose exposure to carcinogens are usually small, studies of such exposure very often lack statistical power.

---

[204] One objective of a carcinogenesis study is to demonstrate, if possible, that levels of exposure to a chemical correlate with the incidence of the disease. But direct measurement of past exposures is rarely feasible and methods for approximating exposure levels are usually crude. For example, investigators interested in the effect of smoking cannot measure the quantities of carcinogens in cigarette smoke or even the volume of cigarettes smoked in a day many years earlier. They are reduced to relying on the study participants' memories as to how many cigarettes a day they have smoked over their lifetimes. Lave, *The Strategy of Social Regulation* 92–97 (1981). Authors of a case-control interview study on coffee asked patients to estimate the number of cups of coffee per day they had been drinking before their present illness. See B. MacMahon, note 206 *supra*.

[205] Statistical power is a function of the ratio of the magnitude of the reported excess cancer risk to the spread of those values around the mean and of the size of the population studied. *See* C. Hand, *Estimating Cancer Risks from Low Doses of Ionizing Radiation*, 209 Science 1197, 1197, 1980.

Increasing the size of the two groups can enhance the statistical power of a study, but large populations are rarely feasible. For example, to detect a very low increased incidence of cancer, e.g., fewer than 10 cases per million, over a reasonably high background rate, e.g., 1900 cases per million, a study would require a population of 100 million.[206] Such a study, obviously, could never be conducted. And even when the populations are large enough to allow confident measurement of differences in cancer incidence, a high background incidence in the controls may make it impossible to determine whether the differences are real. Accordingly, epidemiological studies are rarely capable of determining whether exposure to a chemical is associated with an excess risk of cancer.

This lack of statistical power also weakens the significance of negative epidemiological findings. An example will illustrate this point. Suppose that investigators desire to determine whether exposure to chromium causes brain cancer. A careful study might involve examination of the death certificates of 1,000 chromium plant workers to determine their incidence of brain cancer and comparison with the incidence of brain cancer among 1000 workers of the same sex, race, age, habits, etc., in another industry. The failure of such a study to find an excess risk of brain cancer among chromium workers would not exculpate chromium as a possible carcinogen. A study in a population of only 1000 would not detect even one excess brain cancer if the true risk from chromium were, say, 1 in 10,000—not a notably low risk for ambient exposure to a carcinogen. Furthermore, even if the populations were large enough to detect such a risk, a negative result would not warrant a conclusion that chromium posed no risk because the study would probably lack the power to resolve the expected small difference in measured brain cancer incidence between exposed and unexposed groups.[207] Uncertainties in recordation of the disease and of exposure levels would undermine negative, just as positive, findings.[208] It therefore would be inappropriate to conclude, from a study that failed to find an excess of brain cancer among chromium workers, that chromium does not cause brain cancer or that exposure to it is "safe."

---

[206] *Id.* at 1198.

[207] Since the cancer incidence attributable to chromium is so low, the study could not confidently distinguish a small excess incidence attributable to chromium exposure from a fluctuation in the background incidence of brain cancer expected in the control population. Most epidemiological studies are limited to demonstrating excess risks which are relatively high with respect to the incidence exhibited by the general population. *But see* R. W. Morgan, *Some Notes on Epidemiology* 198 (AIHC 1980). Morgan advocates increased reliance on large epidemiological experiments to evaluate low magnitude health risks. However, the sample sizes he visualizes as providing sufficient power to detect relatively low (10 to 20%) excess risks under several different conditions range from tens of thousands to hundreds of thousands of cases.

According to Dr. Robert Hoover, an epidemiologist at the National Cancer Institute, the lowest relative risk of cancer accepted as having been established by an epidemiological study was 30–40%. OSHA Carcinogen Policy at 5051. Dr. Richard Bates claimed that "few epidemiological studies of occupational cancer have been of adequate sensitivity to detect anything smaller than a 50% excess risk." *Id.* at 5049.

Most chemical carcinogens are expected to cause such small excess risks that they defy detection by standard epidemiological methods. On the other hand, human studies could detect any large excess of disease associated with exposure to a chemical. Negative findings can thus help define an upper limit of excess risk posed by a substance. The smallest excess risk that a well-designed negative study would be capable of measuring can be taken as one approximation of the upper level of risk that the chemical poses.[209]

e. *Uses of epidemiology in regulatory decision making.* Of the four agencies studied here, only OSHA's decisions have been influenced decisively by epidemiological evidence. The industrial workplace is one of the few settings in which human exposures to toxic chemicals have been high enough, prolonged, and sufficiently documented, to permit serious investigation of their health effects. The following discussion illustrates the use of human data in evaluating the risks of one occupational exposure. Thereafter, the still-unsuccessful epidemiological efforts to define the risks of saccharin are described.

The difficulties of conducting and interpreting epidemiological studies are illustrated by a prospective study of steelworkers, which became the main basis for OSHA's reduction of the permissible exposure limits for coke-oven workers.[210] The investigators selected a sample of workers employed on a particular date. One problem with this sample was that the majority of workers had been employed for more than one year; it thus excluded most workers with allergic, cardiovascular, or respiratory conditions that might make them sensitive to chemicals in the steelmaking environment.[211] It became apparent later that steelworkers were significantly healthier than the general population of their same age, sex, and race—a phenomenon that complicates many occupational studies.[212] As in many other occupational studies, the investigators failed to obtain information about workers' initial health status, their personal habits (especially cigarette smoking), their family disease history, or their previous employment history, any of which could affect the health patterns observed.[213]

---

[208] For example, a complete study of the effects of chromium would include the causes of deaths of chromium workers who left the plant as well as those who completed their careers there. Some workers may have left precisely because they became sick. While information of this kind is usually hard to obtain, its absence weakens the significance of any negative findings.

[209] OSHA Carcinogen Policy at 5057–59.

[210] Lave, The Strategy of Social Regulation 93–98 (1981).

[211] *Id.* at 94. An alternative design might have focused on workers hired after the beginning of the study, with special attention given to those who left employment or experienced health difficulties, but such a design would reduce the sample size and the number of years of exposure.

[212] *Id.* It would be important to know how much healthier would these workers be expected to be in the absence of exposures to toxic substances and higher accident rates. A 5% measured increase in life expectancy for workers over that of general population might nevertheless conceal a large occupational risk because the improvement in health should have been much greater in the absence of occupational exposures. *See* Mazumdar and Redmond, *Evaluating Dose Response Relationships Using Epidemiological Data on Occupational Subgroups*, OSHA Carcinogen Policy at 5053 in Breslon and Whittemore, eds., Energy and Health (1979).

Early in the study the investigators found that coke oven workers exhibited much higher cancer mortality rates than the population generally or other steelworkers. Since only a small proportion of steelworkers are employed at coke ovens, however, their sample was small. Furthermore, as concern focused on lung cancer, the failure to collect data on cigarette smoking became a serious deficiency. The suspicion that the excess rate of lung cancer could be due to heavier smoking by coke oven workers was finally put to rest because of the extraordinarily high incidence of lung cancer among these workers, whose rates differ with the amount of time worked and the type of job performed—factors that reflect levels of exposure.

While the study thus demonstrated that exposure to coke oven chemicals sharply increases the risk of lung cancer, it did not provide sufficient information to permit confident estimates of the dose-response relationship. If the number of cancers among the workers were known, if work histories provided a good estimate of the dose, and if current measurements of coal tar pitch volatiles characterized the relevant set of coke ovens for the relevant period of time, the researchers would have had the needed data.[214] But all of these variables were obviously subject to large errors of measurement, and only a few data points could be used in the estimation. Several extrapolation models thus fit the data, but they produced widely different estimates of the amount of lung cancer that could be expected if exposure were reduced.[215]

3. Animal Experiments.

a. *Background.* While human studies have demonstrated the carcinogenicity of approximately two dozen chemicals,[216] their significant limitations diminish their value in regulatory decisionmaking. Toxicology has provided an alternative in the form of experiments in laboratory animals. These experiments comprise the primary data for regulating toxic chemicals, and there is both theoretical and empirical support for their use in assessing human risk. Most human carcinogens cause cancer in several mammalian species; it is thus possible to derive evidence of a chemical's potential human carcinogenicity from tests in other species. Even if the correlation between human and animal responses to carcinogens were weaker, however, regulators would be induced to seek alternatives to epidemiological evidence. To evaluate the risk of chemicals before human exposure occurs, agencies must rely on testing in surrogates. Animal experiments have the conspicuous advantage of providing a source of data from expendable species.

---

[213] *Id.* For example, asbestos workers who smoke are at many time the risk of non-smoking workers.

[214] Lave, *supra* note 210.

[215] *Id.* at 96.

[216] OTA Report at 141.

Toxicologists agree that, although not ideal, the best practical test for identifying causes of human cancer is the long-term bioassay in rodents.[217] Though their details still occasion scientific debate, these tests generally follow a well-accepted pattern:[218] A small population of animals (e.g., rarely more than 400), which have been maintained under similar conditions in a controlled laboratory setting, is divided into groups equally distributed by sex, e.g., 50 animals of each sex per group. One and usually more of these groups is regularly exposed to the test chemical for the major part of their lifespan. A control group of similar size is left untreated. All animals are carefully observed for the appearance of tumors during the study and, at the conclusion, are sacrificed and examined pathologically. The incidence(s) of tumors observed in the exposed group(s) is compared to the incidence of tumors in the controls. Because the groups are otherwise theoretically identical, any increase in tumor incidence in the exposed animals presumably can be attributed to the test chemical.

Although animal bioassays are straightforward in concept, they are difficult to design, execute and evaluate. The standard rodent bioassay requires three to five years to complete and demands coordinated efforts by scientists and technicians who possess skills ranging from routine animal care to pathological diagnosis. The cost of evaluating one chemical in a single rodent species now substantially exceeds $500,000.[219] Each element in the design of an experiment calls for scientific judgment, which later may provide the basis for argument when a regulatory agency seeks to interpret the results. The following discussion highlights common sources of disagreement.

The critical design parameters of animal carcinogenicity tests are the species used, population size, and the dose levels of the test chemicals. Elaborate though they are, current tests reflect major compromises of the theoretical ideal on each point.

b. *Choice of species*. The suitability of an animal species as a model for evaluating human health effects in theory should depend on the similarity of its reactions to human reactions. If the sole criterion were biological similarity, primates would probably be the preferred experimental species. Primates are used in some testing programs,[220] but they have not been seriously considered as a model for carcinogenicity testing. Primates are costly to obtain and house, and their long life span—comparable to man's—impractically prolongs the period needed to observe effects of chronic exposures.[221] Cost and ease of maintenance are thus powerful incentives to select small, short-lived mammals, and rats and mice have accordingly been selected as the primary species for carcinogenicity testing. These rodents can be conveniently maintained at moderate expense and their short life-spans (2–4 years) permit discovery of tumors that only become manifest late in life. Furthermore, they are available in several well-characterized genetic strains whose biology is well-documented.[222]

---

[217] *General Criteria for Assessing the Evidence of Carcinogenicity of Chemical Substances*, Report of the Subcommittee on Environmental Carcinogenesis of the National Cancer Advisory Board, 58 J. Nat'l. Cancer Inst. 461–465 (1977).

[218] EPA, Interim Procedures and Guidelines for Assessing Health Risk and Economic Impacts of Suspected Carcinogens, 41 Fed. Reg. 21402 (1976); J. M. Sontag, N. P. Page, and S. Saffiotti. Guidelines for Carcinogenesis Bioassays in Small Rodents, DHEW Pub. No. 76-801 (1976) [hereafter NCI Bioassay Guidelines].

[219] EPA, Support Document for Test Data Development Standards for Chronic Health Effects, under Section 4 of the Toxic Substances Control Act (1979) [hereafter EPA Test Development Standards].

[220] Primates are commonly used in vaccine testing, and occasionally in testing food additives. Office of Technology Assessment, Cancer Testing Technology and Saccharin, Appendix I, pp. 79, 81 (1977) (monkeys were used in experiments to test saccharin) [hereafter OTA Saccharin Report]. Primates are expensive and difficult to handle in the laboratory. Successful breeding colonies are few and repeated raids on wild populations raise both ecological and ethical issues.

Geneticists have created several inbred strains of rats and mice which are genetically homogeneous. In this respect, these animals differ from the human population,[223] but inbred strains are nonetheless widely used because their very homogeneity facilitates interpretation of test results. The variability in the responses of outbred animals can obscure differences between control and exposed groups; the responses of inbred strains are more easily predicted.[224]

To be a useful experimental model a rodent strain must be capable of contracting cancer. Otherwise, a failure to detect tumors could reveal nothing about the test chemical. Theoretically, administration of a recognized carcinogen to one group, a so-called positive control, should be part of any carcinogenicity test. Routine experiments rarely include positive controls, however, for past observation has established that the strains used in testing are susceptible to cancer.[225]

Although most carcinogens cause cancer in several mammalian species, few do so in all species and fewer still induce tumors in the same organs in each vulnerable species. The lack of uniform response across species undercuts the predictive value of single experiments in two ways. First, a positive result in a single species is less reliable as a forecast of carcinogenicity in other species. More significantly, a negative response in one species provides weak evidence that the chemical will fail to induce tumors in other species. A conclusion that a chemical is not carcinogenic usually requires negative findings in *two* sexes of *two* mammalian species.[226] By contrast, a single finding that a chemical increased the incidence of tumors in one sex of one species is generally accepted as indicating a potential carcinogenic hazard to humans.[227] Evidence of carcinogenicity in a second sex or species reduces concern that some deficiency of the first test species produced the increased tumor rate.[228] Data from positive experiments in two species can also facilitate quantitative assessments of the risk of cancer for humans.[229] Because even species that respond to a carcinogen vary in their sensitivity, an agency will usually select data from the more sensitive species to estimate human risk.[230]

---

[221] There is evidence that the latency period for tumor induction is related to the lifespan of a species. The choice of a long-lived species thus prolongs the time required to conduct a single experiment.

[222] Largely fortuitously, rats have been found to possess some striking physiological similarities to humans which particularly suit them for use as experimental models for assessing human risk.

[223] See NAS/NRC, Principles for Evaluating Chemicals in the Environment 115–133 (1975).

[224] NCI Bioassay Guidelines.

[225] M. Schneiderman and C. Brown, *Estimating Cancer Risks to a Population*, 22 Environmental Health Perspectives 115, 118 (1978).

[226] EPA Test Development Standards at II-9. The two-species criterion is a practical measure, which does not assure that no agent which is carcinogenic for man will slip through. Arsenic is an example, albeit a rare one, of a chemical that fails to induce tumors in animal tests but is a known human carcinogen. V. Bencko, Carcinogenic, Teratogenic and Mutagenic Effects of Arsenic, 19 Environmental Health Perspectives 179–82 (1977).

Most animal strains exhibit some tumors even without deliberate exposure to a known carcinogen.[231] A high spontaneous tumor rate can obstruct analysis of an experiment. Just as in human studies, as a species' background incidence of tumors rises, the incidence of induced tumors must also rise to be detectable.[232] If there were no practical limits on experiment size, a high spontaneous tumor level could be accommodated by increasing the number of animals on test. But the number of animals now used in testing is already near the practical maximum; therefore a high spontaneous tumor rate is a serious disadvantage in a test species.[233]

c. *Number of animals.* The number of animals used is perhaps the major limitation of routine bioassays. Small populations limit experiment sensitivity and dictate the use of high doses of test chemicals.[234] Though confusing to many laymen, the relationship between population size and test sensitivity is straightforward and fundamental.

It is obvious that exposure of ten animals to a chemical that is capable of causing cancer will frequently not detect an effect if the chemical induces tumors in only one of every hundred exposed individuals. Even if 100 animals were used, it is not certain that one, and only one, case of cancer would appear. A cancer incidence of 1 in 100 is a statistical expression, which means that in repeated tests exposing 100 animals, the number of afflicted animals may vary but will be distributed around a mean value of one. Therefore, if the incidence of tumor induction were 1 in 100, it would be expected that in a series of tests each using 100 animals, some tests would reveal no afflicted animals, most would reveal one, while a few would reveal two or three or even more. When the possibility of observing no afflicted animals—and thus failing to detect the chemical's effect is great, a test system is inadequate. Increasing the size of the groups is one way of increasing the test sensitivity.

---

[227] IRLG Scientific Principles at 263; OSHA Carcinogen Policy at 5118. See also CPSC, Interim Policy and Procedure for Classifying, Evaluating and Regulating Carcinogens in Consumer Products, 43 Fed. Reg. 25658, 25663 (1978) withdrawn, 44 Fed. Reg. 23821 (1979).

[228] *See, e.g.*, EPA Test Development Standards at II-9. In dealing with politically sensitive chemicals agencies may see fit to fortify themselves with far more than two positive studies before acting. For example, FDA received the first study showing a risk of bladder cancer in second generation rats exposed to saccharin in 1972. The agency however did not announce its intention to ban saccharin until 1977 after receipt of several more studies, excluding the Canadian bioassay which had prompted a ban of saccharin by the Canadian government only one month prior to the FDA announcement of its contemplated ban. OTA Saccharin Report at 50–79. (OTA cites 10 studies of varying quality done between 1948 and 1977.)

[229] Repeated experiments and large numbers of animals are important statistical parameters which tend to increase confidence in the experimental conclusions.

[230] EPA Test Development Standards at II-10; M. Schneiderman and C. Brown, *Estimating Cancer Risks to a Population*, 22 Environmental Health Perspectives 115, 117 (1978); OTA Saccharin Report at 87.

[231] In some cases, the occurrence of spontaneous tumors by animals in a cancer test can provide confirmation of the capability of the strain to develop tumors. Observation of spontaneous tumors provides evidence of a strain's general capacity to develop tumors, but the induction of tumors by a chemical similar to the test chemical is better evidence that the strain has the capacity to respond to the test chemical if it is carcinogenic.

[232] See Table I, infra.

[233] EPA Test Development Standards at II-19 and 20.

[234] *Id.* at 17–19; OTA Saccharin Report, Appendix I-85.

TABLE I.

INCIDENCE OF TUMORS IN EXPOSED GROUPS REQUIRED FOR SIGNIFICANCE ($p=0.05$) DEPENDING ON TEST GROUP SIZE AND INCIDENCE OF TUMORS IN CONTROLS*

Incidence of Tumors in Controls (%) (spontaneous tumors)	No. of Animals Per Group** 10	25	50	75	100
0	50%	20%	12%	8%	6%
10	70	40	28	24	21
20	80	52	40	36	34
30	90	64	52	47	45
40	100	72	62	58	55

*Calculations based upon tabulations of Mainland and Murray (1952) and presented by Page (1977a).
**Exposed and control groups of same size.
Source: EPA Test Development Standards at II-19.

Table 1 illustrates the relationship among test sensitivity, group size, and background incidence of tumors. Where the spontaneous or background incidence is zero percent, the *minimum* incidence of afflicted animals (tumors) considered experimentally significant in a group of 100 test animals is 6 percent; in a group of 50 animals, it is 12 percent. The spontaneous occurrence of tumors in the test species increases the minimum incidence that can be detected experimentally. Given a background incidence of 10 percent, groups of 50 animals are the smallest in which a reasonable incidence of tumors (less than 40 percent) can be distinguished from chance fluctuation. Thus, a test using groups of that size can detect only a very high incidence of tumors. Even the most potent human carcinogens, however, are not encountered at levels that produce tumors in 12 percent of the population.

Practical constraints discourage continued expansion of the size of groups to increase test sensitivity.[235] Increasing the sensitivity of the standard single-species experiment by an order of magnitude would require enlarging each group to 500 animals of each sex, a total of 3,000 animals for a two-dose experiment. The expense of such experiments, not to mention the lack of trained pathologists to interpret them, precludes routine testing on this scale.

d. *Dose levels*. The practical limits on the size of animal experiments have led to the use of high test doses, which are necessary to produce a detectable incidence of tumors. Experimenters customarily use the highest dose the animals can tolerate without experiencing other unacceptable adverse health effects.[236] Higher doses may overload the animals' system and distort their metabolism of the test chemical; even the "maximum tolerated dose" (MTD) may produce other adverse effects in the animals. More important, high test doses complicate interpretation because they generally exceed, sometimes by several orders of magnitude, the levels at which humans are likely to be exposed to the test chemical. Despite these difficulties, toxicologists generally support the use of high experimental doses to determine whether a substance is capable of causing cancer.[237] This practice has, however, often occasioned public misunderstanding of test results and sometimes evoked barbed criticism of agency reliance on animal data.[238]

A desired product of any animal bioassay is a positive correlation between increasing dose and response which supports the inference that the chemical caused the response. In addition, data demonstrating effects at several dose levels can be helpful in estimating the degree of human risk. Accordingly, it is now common practice to administer two or even three dose levels of the test chemical, usually the MTD and at least one lower dose. However, positive responses from a broad range of doses are not required to demonstrate a chemical's carcinogenicity, and routine bioassays frequently fail to produce a dose-response curve. A test's lack of sensitivity may restrict the dose range at which a response can be reliably detected. Furthermore, the selection of appropriate doses on the basis of sub-chronic tests is not foolproof. For example, the highest dose administered may turn out to have unacceptable adverse effects, or the lowest dose may produce no response at all.

---

[235] A small increase in size would not be meaningful. Even a ten-fold increase would not produce the sensitivity necessary to detect the effects of likely levels of human exposure to most carcinogens, but it would severely strain practical test limits. Using five hundred instead of fifty rats of each sex per group, a three-dose experiment would require 4000 rats. The care, feeding, and daily observation of this many rats is no small task, but is only the beginning of the work. After each animal dies it must be autopsied, and its organs prepared for histological examination. Then a series of slides from each of the organs of each animal must be individually evaluated for evidence of tumor formation. Repetition of the experiment in a second species would double the number of animals to 8000.

[236] There is no general agreement on the parameters for a maximum dose. According to NCI, the two important criteria for determining the maximum tolerated dose are that the dose neither shorten the life span of the animal nor retard weight increase by more than 10 percent compared with controls. NCI Bioassay Guidelines OTA Reports at 123–26. EPA on the other hand has defined its high dose level to be the "maximum dose level that can be administered for the duration of the test period with demonstrable but only slight toxicity in test animals, and no substantial reduction in longevity due to effects other than tumors." EPA Test Development Standards II 21–22.

[237] OTA Report at 125–26.

[238] OTA Saccharin Report at ___.

A "no effect" level is the dose level of a chemical, known to be toxic at high doses, at which—and thus presumably below which—adverse effects are not observed. No-effect levels can be determined for many non-carcinogens and are commonly used by regulators in setting exposure levels that are presumed safe. But routine animal bioassays are not capable of demonstrating a no-effect level for a carcinogen. First, their insensitivity makes them incapable of ruling out the possibility of tumors in a small percentage of exposed individuals.[239] In addition, assumptions about the mechanism of carcinogenesis are consistent with the occurrence of tumors at extremely low doses. Thus there currently is no practical method for determining no-effect levels for carcinogens experimentally.[240] The most any negative bioassay can convincingly demonstrate is the maximum risk of cancer that a chemical may pose, i.e., the incidence that could escape detection.

e. *Route and duration of exposure*. The route by which an animal is exposed to a carcinogen may not only influence the sites at which tumors develop; it can determine whether tumors occur at all. Common experimental routes of exposure include ingestion (in food or water), intubation (force-feeding through a tube), inhalation, and direct application to the skin (dermal exposure). The route of exposure in a bioassay is chosen by convenience and, in studies conducted specifically for use by regulators, by analogy to probable routes of human exposure. Ingestion is by far the most common route of administration, but feeding studies require regular monitoring of the animals' intake of food and water to determine the doses to which the animals were exposed.

Exposure to the test chemical is usually continuous from time of weaning to some specified date near the end of the animals' lives, usually 24 to 30 months from the commencement of the study. Lifetime exposure maximizes the total dose and theoretically compensates for the insensitivity of the test.[241] The period of exposure is often extended by beginning treatment *in utero*, exposing pregnant females and then continuing administration to the offspring throughout their lives.[242] Occasionally, exposure is terminated prior to the end of the animals' lives to permit observation of any regression of reversible growths.

f. *Conduct and evaluation*. A bioassay requires at least two years to conduct and several more months to analyze and report, and demands attention to detail at every stage. The animals must be maintained in clean surroundings, exposed according to pre-determined schedule (usually daily) to the test chemical, and carefully handled to avoid interruption of treatment or mixing of the groups.

---

[239] See Table II, *supra*.

[240] OTA Report at 125–26; 167–69.

[241] EPA Test Development Standards II-15.

[242] OTA Saccharin Report at 51–60. Only "two generation" studies have consistently showed saccharin to be a bladder carcinogen in rats.

Each animal should be examined periodically for signs of contagious disease as well as for early evidence of tumors. Laboratory personnel must be particularly alert to detect dying animals and act promptly to preserve organs and tissues. Autolysis, or disintegration of tissue, commences immediately after death and destroys the delicate cell structure which enables pathologists to diagnose and classify tumors.[243] Furthermore, rats and mice have a tendency to cannibalize the remains of recently deceased cagemates. Routine of observation is tedious but vital to the reliability of experimental findings.

At the predetermined date,[244] all surviving animals are sacrificed, their organs are examined visually,[245] and selected tissues are then prepared for microscopic examination. In elaborate studies, slides will be prepared from between 30 and 40 tissues from each animal.[246] This histopathology is a costly and critical stage of the evaluation process.

The final stage of the study is the diagnosis of any tumors each animal experienced and the computation of the incidence of each type of tumor for each exposure group.[247] Such diagnosis depends primarily on the appearance of tissues under a microscope and can be performed only by trained pathologists. Classification of observed tumors is rarely unequivocal; it usually calls for judgments on which even the best pathologists may disagree. Some study protocols specify that slides are to be evaluated by more than one pathologist, and regulatory agencies often seek the judgment of several experts in interpreting the results of controversial tests.[248]

---

[243] In an experiment using only 50 annuals per dose groups, the loss of even a few animals can severely impede determination of tumor incidence. As the experiment progresses, information accumulates in the physical states of individual animals. It therefore becomes increasingly important to take the precautions necessary to avoid losing animals. EPA may not accept studies with losses greater than 5 percent per group. EPA Test Development Standards II-34.

[244] E.g., EPA requires that substance be administered for 24 months. EPA Test Development Standards II-20.

[245] *Id.* at 29–30.

[246] The number of tissues to be examined is a matter of debate. *Id.* at II-41. EPA requires detailed microscopic examination of 30 to 40 tissues in each animal. *Id.* at II-5.

[247] *Id.* at II-41.

[248] An example of the lack of precision in the diagnosis of the presence and type of cancer in an animal carcinogenicity came to light when FDA abruptly withdrew its proposal to phase out the use of nitrite on the ground that the tissue slides from the animal test ostensibly showing nitrite to be a carcinogen had been incorrectly interpreted. The agency's original decision to phase out the use of nitrite had been based on a single well-designed study conducted by a respected researcher, Dr. Paul Newborne at MIT. But a review of the slides from the study by a panel, which included scientists from three federal agencies and other qualified non-government pathologists, uncovered significant disagreements with the author's report. In the reviewer's opinion Newborne had misdiagnosed a tumor type that was known not to be related to nitrite administration. The reviewers also disagreed with Newborne's diagnosis of other lesions as precursers of cancer. Calculations based on data from the reclassified slides failed to show any increase in lymphona among animals treated with nitrite compared to controls.

The expenditure of time and resources necessary to resolve this particular controversy underscore the fact that histopathological diagnosis of tissue slides is far from a routine operation. Disagreement among experts is not uncommon. This has promoted the suggestion that a panel of pathologists be used instead of a single expert to evaluate the slides from animal tests. Implementation of such a proposal would further increase the demands of animal toxicity testing on the professional pathological resources. See Smith, *Nitrites: FDA Beats a Surprising Retreat*, 209 Science 1110 (1980).

g. *Distinguishing initiators and promoters.* Relatively little is known about the mode of action of most chemical carcinogens. There is, however, growing support for the hypothesis that they can be classed in two broad categories: initiators and promoters.[249] According to this hypothesis, initiators interact with normal cells to produce cell types that are capable of developing into a tumor. These "initiated" cells remain dormant, however, unless they are also exposed to a promoter, which can stimulate their development to a mature tumor.[250] Many chemicals identified as initiators also apparently have promoter properties and are thus believed capable of supporting the complete development of tumors, i.e., they are complete carcinogens. Other initiators seem to require the collaboration of a promoting agent. Agents that are only promoters are incapable of producing tumors in the absence of initiation.

While this hypothesis of two-stage carcinogenesis has growing support, the process is far from understood. If it gains general acceptance, the ability to differentiate experimentally between the two types of molecules might become important. If a chemical could be reliably characterized as a promoter, infrequent human exposure might entail very little risk of cancer. Standard animal experiments, however, are not now designed to permit such distinctions, and little progress has been made in developing tests capable of routinely classifying chemicals as promoters or initiators.[251] Furthermore, it is uncertain whether the information, even if obtainable, would materially aid decisionmaking about specific chemicals.[252] All animals are constantly being exposed to a vast array of chemicals. It is possible that all mammals contain dormant initiated cells whose development depends on exposure to promoters. Conversely, the milieu conducive to promotion may be endogenous and tumor development may await exposure to initiators. The prevalence of spontaneous tumors indicates that most animal species have either encountered or contain agents with both properties. Accordingly, even if a chemical could be classed as a promoter, knowledge of the biological state of exposed humans would be needed before this classification could be significant for regulation.

4. *Short-term Tests.*

In the last decade scientists have designed a variety of short-term tests to reveal information about the potential carcinogenicity of chemicals. The results of their efforts have inevitably made their way into regulatory decisionmaking. These short-term methods include a variety of *in vitro* (i.e., outside of a living organism) tests in various stages of development or use. They typically measure chemical properties that are thought to be related to the likely mode of action of carcinogens. The most common tests measure either genetic mutation in bacteria[253] or so-called "transformation" of mammalian cells maintained in tissue culture to a state in which their growth behavior and surface properties resemble those of cancer cells.[254] Other short-term tests for carcinogenicity are under development.[255]

---

[249] See generally, J. L. Marz, *Tumor Promoters: Carcinogenesis Gets More Complicated*, 201 Science 515 (1978).

[250] Biochemically, initiators are thought to interact directly to modify the cells' genetic material. *See* Berenblum, *Theoretical and Practical Aspects of the Two-Stage Mechanism of Carcinogenesis* 25, 26, in Carcinogens: Identification and Mechanism of Action (1978). Promoters however are thought to act by other mechanisms, perhaps as cell growth regulators. Bouthwell, *Biochemical Mechanism of Tumor Promotion* 49, in 2 Carcinogenesis, Mechanism of Tumor Promotion and Cocarcinogenesis (1978).

[251] OTA Report at 66.

[252] A. C. Kolbye, *A U.S. Viewpoint: Legislative and Scientific Aspects of Cancer Prevention*, 9 Preventive Medicine, 267–274 (1980). But see C. Campbell, *A Novel Decision Free for Regulatory Decisions on Food Chemicals*, 57 Toxicology and Applied Pharmacology (1981), for a regulatory decision making mechanism which takes into account the classification of a chemical as either an initiator or modifier of carcinogenesis.

The best known of the short-term tests is the Ames test for bacterial mutagenicity.[256] The test uses a specially constructed strain of bacteria which ordinarily will not grow without certain special nutrients. These bacteria, after treatment with the test chemical, are placed in a mixture lacking the special nutrients. Since only mutant bacteria which have acquired new functional ability can grow in the deficient media, the bacteria growth measures the ability of the test chemical to mutate the bacterial DNA. While there is a high correlation between a chemical's ability to mutate bacterial DNA in this test and its ability to produce tumors in animals,[257] the correlation is not perfect; roughly ten percent of the chemicals which Ames found mutagenic did not prove positive in bioassays.[258] Positive results in the Ames test or in one or more other short-term tests have not generally been regarded by regulators as decisive predictors of human hazard, but they often have been cited as confirmatory of other evidence of carcinogenicity.[259]

Because positive findings in short-term tests have been shown to correlate well with evidence from animal experiments, and because the tests are rapid and inexpensive, they have been relied on increasingly by industry in determining which chemicals to develop and by regulatory agencies in determining which chemicals should be tested further.[260] Short-term tests can be performed in a few days or at most a few months,[261] and individually rarely cost more than $1,000.[262] A battery of different short-term tests can facilitate rapid screening of the large number of chemicals to which humans are exposed.[263] Short-term tests can also aid in ranking chemical carcinogens according to their relative potency. None of the current tests, however, yields data for quantitative predictions of human risk.

---

[253] *See* R. Deverat, *Bacterial Tests for Potential Carcinogens* 241 Scientific American 40 (1979); Venett, *Bacterial Mutation as an Indication of Carcinogenicity*, 36 But. Med. Bull. 57–62 (1980).

[254] *See* R. J. Pienta, J. A. Poiley, and W. B. Lobherz III, *Morphological Transformation of Early Passage Golden Syrian Hamster Embryo Cells Derived from Cryopuserved Primary Cultures as a Reliable In Vitre Bioassay for Identifying Diverse Carcinogens*, 19 Internat'l J. of Cancer 642–655 (1977).

[255] *See* T. Maugh, *Chemical Carcinogens: The Scientific Basis for Regulation*, 201 Science 1200, 1203–4 (1978). See OSHA Carcinogen Policy 5162–5164; Lutz, *Invivo Covalent Binding of Organic Chemicals to DNA as a Quantitature Indicator in the Process of Chemical Carcinogenesis*, 65 Mut. Res. 289 (1979).

[256] B. Ames, *Identifying Environmental Chemical Carcinogens*, 204 *Science* 587, 1979.

[257] In a validity study of 300 chemicals, roughly 90 percent of the identified animal carcinogens gave positive results in the Ames test. McCann, J. E., Chois, E., Yamosaki and B. Ames, *Detection of Carcinogens as Mutagens Notice Salmonella/Microsome Test: Assays of 300 Chemicals*, 72 Proc. National Acad. of Sciences 5135–5139 (1975); J. McCann and B. Ames, 73 Proc. Nat. Acad. Science 950 (1976). In addition to confirming the relevance of Ames tests results, this observation is powerful evidence that genetic alterations are an important event in carcinogenesis.

[258] In other words, although non-carcinogenic the chemicals nevertheless mutate bacterial DNA. The incidence of "false negatives," i.e., those results in which chemicals that cause cancer in animal tests do *not* mutate bacterial DNA was also ten percent. McCann, et. al, *supra* note 289.

[259] OSHA Carcinogen Policy at 5173.

5. *Chemical Structure.*

Prior knowledge of the physical and chemical properties of a substance can provide limited information about its capacity to cause cancer. Scientific literature on the association between carcinogenicity and the structural and functional characteristics of chemicals is extensive.[264] For example, chemicals capable of causing mutations are thought to belong to a group called electrophiles; determining that a chemical falls within that group supports the suspicion that it may be mutagenic and, thus, potentially carcinogenic.[265] Like the short-term tests, knowledge of chemical and physical properties can be used in screening chemicals and thus aid in setting priorities for further testing.[266] But such knowledge alone cannot support predictions of carcinogenicity and it therefore has never been key to a decision to control exposure.

6. *Determining Human Exposure.*

a. *General approach.* Even a chemical capable of causing cancer cannot harm humans if humans are not exposed to it. The risk posed by a carcinogen is a function of the number of people exposed to it and the route and magnitude of their exposure, as well as of the potency of the substance itself. Accordingly, some inquiry into exposure is an integral part of regulatory decision making. Techniques for measurng or predicting exposure to chemicals in the environment are, however, more varied and generally less systematic than the experimental methods for evaluating carcinogenicity.[267] Perhaps for this reason, exposure issues have often been treated more casually in agency decisions. But where Congress has instructed regulators to assess the costs of regulation as well as the health benefits, they have had to devote increasing attention to such issues.

---

[260] The Ames test, for example, can provide a quantitative measure of the potency of a mutagen. R. Devoret, *Bacterial Tests for Potential Carcinogens*, 241 Scientific American 40, 45 (1979).

[261] OTA Report at 115.

[262] *Id.*

[263] OTA Report at 121–22.

[264] *See* generally, L. Slesen and R. Sardler, *Categorization of Chemicals Under the Toxic Substances Control Act*, 7 Ecology L.Q. 359, 374–82 (1978).

[265] *Id.* at 362–63; OTA Report at 116–20.

[266] OSHA Carcinogen Policy at 5178. OSHA said it would use evidence of "structural similarity" in priority setting. See OTA Report at 21.

[267] See OTA Report at 145; NAS, Risk Assessment in the Federal Government: Managing the Process (1983).

In the regulatory context, the term "exposure" has multiple meanings. Often it is used to describe a setting in which humans enounter a substance. Thus *an* exposure to a carcinogen can be a particular context (at work) or medium (in food) in which humans come into contact with the substance. Whether an exposure to a carcinogen involves a risk of cancer and, if so, what the magnitude of that risk is are functions of other characteristics of the exposure, specifically the route by which humans encounter the substance and the quantity they are likely to absorb.

Because the data suggesting that a substance can cause cancer usually are the product of animal feeding studies, it could be inferred that the substance may have to be ingested to cause cancer.[268] One might question the relevance of such evidence in evaluating the risk to humans posed by other routes of exposure. It is clear, however, that substances that are inhaled or applied topically can be absorbed and metabolized. At the same time, even when the route of human exposure duplicates the laboratory model, there may be differences in the way animals and humans metabolize the substance that could affect assessment of the risk to man.

The regulator's inquiry should be to determine whether humans encounter a carcinogenic material by a route that permits it to enter their systems and reach organs that are vulnerable to its effects. But verification of human uptake alone may not justify regulation. The next level of analysis, theoretically, is to determine the effective dose to which humans are exposed. This may involve a dual inquiry: a determination of the levels of the chemical present in the environment, *e.g.*, in the workplace or in food, and a determination of the levels of human uptake. Agencies routinely must make substantial compromises in their efforts to answer these questions.

While the evaluation of human exposure to environmental carcinogens can assume broad scope and sophistication, in some regulatory programs it requires no effort at all. If a chemical is submitted for approval as a food additive, for example, FDA can confidently assume that some humans will ingest it. Since the Delaney Clause forbids approval of any carcinogen as a food additive, no further inquiry is necessary to justify regulatory action. Sometimes the exposure issue arises as a question of agency jurisdiction. For example, FDA has responsibility for regulating indirect food additives—substances used in contact with food—but if such a substance is not "reasonably expected to become a component" of food, it is not subject to the agency's jurisdiction.[269] The issues whether a packaging material migrates into food thus has legal as well as health implications.

Each exposure to a carcinogen can in theory be characterized to reflect (1) the levels, frequency, and duration of exposure; (2) the form of the substance; (3) the route of human exposure; and (4) the likelihood of human uptake of the material. Careful assessment of the health risk posed by exposure to a carcinogen would require exploration of each element. For example, to assess accurately the risk posed by asbestos linings in hand-held hairdryers, the CPSC would have to determine, first, whether asbestos was released during use; second, how much asbestos was released each time a dryer was used and how often, on average, dryers were used; third, the form of any released asbestos; and fourth, the likelihood that released particles would be inhaled by users of hairdryers or members of their households. Verifying each feature of this one type of exposure to asbestos could obviously be a protracted undertaking.[270]

---

[268] OTA Report at 126.

[269] 21 U.S.C. § 321(s); Merrill, Carcinogens in Food at 222–26.

An agency's task is simplified if the levels of a chemical accessible to humans are known, *e.g.*, as is the case for food additives, and the route of exposure associated with cancer induction parallels the route of exposure to be regulated. Sometimes levels of a chemical in the environment are easily established but the route of human exposure differs from routes evaluated experimentally. Then the agency must determine or estimate levels that are taken up and compare them with the experimental doses. When a chemical is present in the ambient environment, an agency usually attempts to measure concentrations at various locations over time to determine average exposures and depletion patterns. With workplace exposures, it may also be possible to verify actual absorption through physical examination of exposed employees. But in the case of episodic and possibly widely varying exposures, e.g., from asbestos in hand-held hairdryers, estimation of ambient levels may be possible only through simulation and determining acutal absorption may be virtually impossible.[271]

b. *Agency performance*. Data describing the wide variety of human exposures to chemicals is of uneven quality. Current limits of analytical chemistry preclude routine monitoring of some exposures. Some sophisticated computer models have been developed for predicting, from emissions data and information about meterological and terrestrial conditions, the magnitude and duration of human exposure to chemicals distributed in air and water. But some substances are encountered in distinctive ways, making measurement of particular human exposures a unique and sometimes costly undertaking. FDA has access to food consumption surveys conducted by the U.S. Department of Agriculture and has commissioned studies of dietary habits. These data permit rough estimates of exposure to intentional ingredients of common foods; they are less useful in predicting atypical consumption patterns. Furthermore, they have few counterparts. Other agencies typically rely on a combination of environmental monitoring, laboratory testing, and occasionally sheer hypothesis.

The care with which agencies assess chemical exposures depends on several circumstances. An agency is more likely to go beyond a back-of-the-envelope estimate if methods for measuring exposure have been developed or monitoring data are available. It is, obviously, more likely to perform a careful assessment if the governing legal standard requires refinement or it is able to require manufacturers or distributors of a substance to generate necessary data. In most of the programs studied here, however, the agency bears the burden of gathering exposure data. Agency exposure estimates, accordingly, have often been perfunctory.

---

[270] Generally, empirical verification of exposures requires new investigations, for rarely is there any independent record of consumption or use patterns.

[271] See Merrill, Consumer Products at 1272–73, 1346–51.

The four agencies studied have rarely disagreed in their assessment of a substance's carcinogenicity but they have often appeared to diverge in their assessments of the magnitude of the risks posed by a chemical.[272] Such differences have usually reflected differences in the exposures for which are responsible and in the legal standards they must apply. No actual episode provides the ideal example, but a hypothetical case can illustrate this phenomenon. Suppose that a substance used as an ingredient in food, as a component of consumer products, and as a pesticide is found to be carcinogenic. The four agencies might respond to this finding in different ways. EPA, for example, might conclude that neither the exposures experienced by pesticide applicators nor consumers of food posed a serious risk, and decline to restrict usage. FDA, by contrast, would ban the substance as a food additive.[273] The CPSC could discover that the substance was incorporated in consumer products in such a way that human uptake was unlikely and thus conclude that any risk was negligible.[274] OSHA, meanwhile, would presumably require that the levels to which production workers were exposed be reduced to the lowest feasible level.[275]

It should not be surprising that the four agencies might assess the health risk of the same chemical differently. In reality, the agencies regulate uses and exposures, not chemicals; their jurisdiction is defined by chemical uses or exposure contexts. It would be surprising if a chemical encountered in several different contexts posed a comparable risk in each one. Exposures are likely to vary in route, level, duration, and frequency; the form of the chemical may vary as well. These differences may warrant radically different assessments of risk, wholly apart from differences in outcome dictated by statutory criteria.

The four agencies also differ in their approach to assessing exposure. The discovery of a food-packaging material in food may conclude FDA's inquiry into the issue of human exposure.[276] In regulating environmental contaminants, however, the agency has also attempted to measure levels of contamination and estimate frequency of consumption, primary because it interprets the statute as requiring some balancing of costs of control.[277] The agency generally performs its own tests to determine contamination levels, but it has relied primarily on existing food consumption data to estimate average individual exposure. For FDA, route of exposure has not often been an issue.[278]

In many proceedings, the CPSC has rested on the discovery that a substance present in consumer products is accessible to consumers during ordinary use.[279]

---

[272] See "Low Growth," Wall Street Journal, October 10, 1976 (discussing the varied responses of the several agencies to acrylonitrite).

[273] See Merrill, Regulating Carcinogens in Food at 178–84.

[274] 43 Fed. Reg. 25661, 25664, (1978); Merrill, Consumer Products at 1298.

[275] *See* OSHA Draft at 77, 79.

[276] This need not be so. See *Monsanto Corp. v. Kennedy*, 613 F.2d 947 (D.C. Cir. 1979).

[277] Merrill and Schewel, Environmental Contaminants at 1379–82.

[278] But see 45 Fed. Reg. 72112 (1980) (lead acetate in hair dyes).

[279] *See* Merrill, Regulating Consumer Products at 1349.

Route of exposure has not been a critical issue. In some recent cases, however, the Commission has not been content to rely merely on the fact of exposure and has commissioned studies to determine extent and duration. These studies have usually involved simulated use of a product in laboratory settings, where concentrations can be reliably measured over time.

Of the four agencies, OSHA appears best positioned to estimate actual levels of human exposure to toxic materials. Not only can its inspectors monitor industrial establishments, but it can call on investigations by NIOSH and, increasingly, on exposure records kept by employers. It has, however, often been impeded by the difficulty of determining exposure levels from years past, a persistent obstacle to the conduct of epidemiological studies.[280]

EPA may have the most difficult task of assessing exposures because humans encounter pesticides in so many different contexts. Consumers may ingest small amounts on target crops as well as on other commodities contaminated by drift during application or through environmental transfer. Residents of localities where pesticides or herbicides are used frequently may encounter ambient levels high enough to be of concern. Pesticide applicators encounter the highest levels but may also be better equipped to control exposure through cautious use and by protective clothing. EPA thus must often consider several different populations whose exposures vary in every dimension, and assess the risk for each before deciding whether a pesticide causes ''unreasonable adverse effects.''[281]

c. *Analytic methods*. An agency's ability to measure human exposure to a carcinogen, whether for the purpose of assessing the health risk or monitoring compliance with regulations, is limited by the capability of chemical analysis. This technology has witnessed genuinely extraordinary advances during the last two decades. Sophisticated analytic procedures, including gas and liquid chromatography and radio-labeled isotopes, have permitted analysts to detect and measure compounds at extremely low levels. Indeed, this improvement in analytic technology that has significantly enlarged the universe of potential carcinogens to which humans are exposed—by revealing their presence in materials or environments for the first time.

Despite remarkable advances, however, the technology still has limits. Some chemicals cannot be distinguished at extremely low levels in many media. Methods may exist for verifying a chemical's presence, but concentrations may be below the limit of measurement, impeding quantitative assessment. Occasionally, the agent responsible for cancer may not be known. For example, the constituent of coke oven emissions that produces an increased incidence of lung cancer among exposed steelworkers has not been identified. OSHA therefore selected another easily measured constituent of coke-oven emissions as a marker for monitoring compliance.[282] Accordingly, an agency must match its regulatory requirements to materials that can be detected and specify control levels that are within the range of reliable measurement.

---

[280] See discussion of the study of coke oven emissions at text accompanying notes 210–15.

[281] See NAS, Regulating Pesticides 66–89 (1980).

[282] See 41 Fed. Reg. 46742 (1976).

Just as the capability of analytic methods can restrict an agency's ability to measure exposure to carcinogens, improvements in chemical analysis can enhance its capacity to evaluate and control exposure. Indeed, such improvements may reveal health hazards not previously recognized. For example, progressive refinements in analytic methods eventually revealed residues of DES in marketed cattle to which the drug had been administered.[283] A similar phenomenon has forced FDA to reassess its approach to regulating packaging materials that migrate to food.[284] Here analytical improvements have enlarged FDA's regulatory jurisdiction by confirming previously unsuspected or ignored residues.

E. Quantitative Assessment of Risk

1. Background.

Some of the most intensely debated issues in health regulation surround the efforts to develop quantitative estimates of the risk posed by specific substances. A variety of incentives have encouraged regulators to devise methods for quantifying risk. Quantification permits differentiation among chemicals that are potential candidates for regulation and, thus, aids in setting priorities. Numerical depiction of the risks of particular chemicals can be used to illustrate the health benefits obtainable from controlling human exposures. Perhaps most important, and certainly most controversial, quantitative risk assessment facilitates analysis of the costs and benefits of alternative control strategies.

Many observers have criticized quantification, particularly if used to set exposure limits for carcinogens. They call attention to the wide disparities in the risks predicted by different models. They stress, as well, the lack of empirical verification of any of the models and the uncertainties inherent in extrapolating from animals to humans.[285] Supporters of quantitative risk assessment acknowledge these deficiencies, but defend its use as a means of structuring decisions that inevitably involve substantial uncertainties. They further contend that intelligent evaluation of efforts to reduce human exposure to carcinogens requires some method for estimating the magnitude of the health consequences of alternative control measures.[286]

Broadly defined, quantitative risk assessment is a method or process of calculating the estimated likelihood that a particular exposure to a substance will cause cancer. While the mathematical models available to perform such a calculation vary in both their operation and outcomes, they start from the common assumption that the likelihood of harm from exposure to a toxic substance is a function of two variables: the potency of the substance and the dose, the latter characterized by the level, route, and duration of exposure. In this respect, the assumptions underlying quantitative risk assessment for carcinogens do not in principle differ from those historically relied on in evaluating other types of toxic effects.

---

[283] See Merrill and Hutt at 485–96.

[284] *See Monsanto Corp. v. Kennedy*, supra note 276; Merrill and Hutt at 86–95.

[285] *See* OSHA Carcinogen Policy at 3189–95.

[286] See Lave, The Strategy of Social Regulation 31–34 (1981).

Government agencies have used quantitative techniques in regulating hazardous materials for several decades. Like the contemporary extrapolation models for carcinogens, these techniques assumed that the capacity of a substance to harm an organism was a function of the dose; lower doses were likely to be safer than higher ones. Traditional regulation of non-carcinogens relied on so-called ''safety factors,'' which were applied in the following way. On the premise that many cells had to be damaged before an organism sustained permanent harm, toxicologists conducted tests to determine the highest dosage that produced no adverse effects in experimental animals.[287] The regulator would divide this ''no observed effect'' level by a predetermined number, i.e., a safety factor, to arrive at a dose predicted to be without risk for humans. For direct food additives, for example, FDA ordinarily used a safety factor of 100.[288] While there were attempts to justify these safety factors biologically, most toxicologists would concede that the concept was simply an attempt to account for the possibility that humans might be more sensitive than the species tested, and that the precise numbers used were selected for reasons of convenience.

It should be stressed that this approach to quantification was not designed to estimate the magnitude of the risk associated with exposure to a chemical. Rather, the approach rested on the assumption that toxic materials had thresholds. The ''no observed effect level'' was an approximation of this threshold for the species tested; the safety factor accounted for the possibility that humans, being more heterogeneous, might also be more vulnerable. The permitted exposure level derived by this method was accepted, probably literally as well as operationally, as ''safe.'' Although regulatory agencies occasionally used safety factors in regulating carcinogens,[289] it was recognized that this approach was inconsistent with the no threshold hypothesis that dominates current thinking.

Other quantitative approaches are illustrated by FDA's and EPA's evolving efforts to regulate residues of carcinogens used in the marketing or production of food. Animal drugs, indirect food additives, and pesticides present analogous regulatory problems. It was never the objective of producers that these substances should become part of the food people consumed, yet it has been recognized that some carryover was likely. The objective of regulation has been to limit any residues to ''safe'' levels. For carcinogens, the Delaney Clause theoretically would forbid any residues at all. But this policy has always been subject to the practical constraint that FDA cannot prohibit what it cannot detect.

In choosing methods for detecting animal drug residues, for example, FDA has long been confronted with the reality that any choice effectively sanctions residues the method chosen cannot find. For several years, the agency set a numerical figure, of 2 parts per billion, as a numerical target for regulatory assays for carcinogens. Like the safety factor approach, FDA's selection of 2 ppb did not represent an effort to quantify the risk associated with exposure to low levels of carcinogens; rather, it was an expression of the agency's willingness to ignore lower exposures. While ostensibly justified on toxicological grounds, this approach was dictated by necessity and convenience. FDA never attempted publicly to reconcile it with the no threshold hypothesis, to which the agency had consistently adhered.

---

[287] Kimm et al., ''Waterborne Carcinogens: A Regulator's View,'' in Crandall and Lave, eds., The Scientific Basis of Health and Safety Regulation, at 229 (1981).

[288] Merrill, Carcinogens in Food at 207.

[289] FDA sometimes used a safety factor of 1000 in determining negligible migration levels for indirect food additives that might cause cancer. See correspondence to the author from Joseph V. Rodricks, then Assistant to the Director for Science Policy, FDA Bureau of Foods, September 28, 1978.

Unlike these numerical approaches for setting exposure limits for toxic materials, the methods for quantitative risk estimation currently being used by, or urged upon, regulatory agencies are designed to illuminate the probable consequences of alternative control measures and, in some cases, to identify risks that can be considered insignificant. Subsequent sections describe the methods, summarize their scientific underpinnings, and analyze their strengths and weaknesses.

2. *Estimating Cancer Risks..*

Assessment of the magnitude of the human cancer risk presented by a carcinogen requires two types of information and a method for relating them. The first is information about the incidence of cancer produced by different doses of substance, i.e., a dose-response curve. The second type of information needed is information about the exposures humans are encountering or are likely to encounter. There are perhaps half a dozen mathematical extrapolation models that can be used to relate these two types of information. Some such model is necessary because the information about potency and exposure are almost invariably derived from different sources.

Human epidemiological studies often, perhaps usually, are not sensitive enough to detect the effects of prevailing levels of exposure to most substances that cause cancer.[290] In the majority of cases, therefore, agencies must make decisions on the basis of data derived from experiments with laboratory animals. But standard animal bioassays, for both economic and scientific reasons previously outlined,[291] employ doses that proportionally are much higher than those to which humans are exposed. Some method is needed to translate these data into realistic estimates of the magnitude of the risk to humans.

Accordingly, quantitative risk assessment usually involves two extrapolations, both of which introduce uncertainties. The first extrapolation is from laboratory animals to humans; the second is from the high doses observed to cause cancer in animals to likely human exposure levels below the range for which data are available. Actually, where both extrapolations are being performed, there is a third source of uncertainty. For we are asked to assume not only that magnitude of risk is a function of dose and that animals are reliable qualitative predictors of potential human hazard, but also that the dose-response experience of animals is likely to replicate that of man. The premise of the first extrapolation—that an agent which induces cancer in other mammals presents a potential risk for man—is well-accepted.[292] There is also considerable evidence that, within species, cancer incidence generally increases with dose. Physiological differences between experimental animals and man, however, weaken confidence in quantitative extrapolation between the species.[293]

---

[290] Hoover and Strasser, *Artificial Sweeteners and Human Bladder Cancer*, 1 Lancet 837 (1980).

[291] See text accompanying notes 236–40 *supra*.

If a regulator desires to quantify the risk associated with human exposure to animal carcinogens, however, this extrapolation is unavoidable. To perform this extrapolation, some adjustment must be made for the obvious disparity in the sizes of the two species to posit biologically comparable human doses. This adjustment is reflected in a so-called "scaling factor" by which animal dose-response data are translated into ostensibly equivalent human doses. Several different approaches have been advanced as biologically rational.[294] The scaling factors currently popular with regulatory agencies make comparisons on the basis of dose per unit of surface area, *e.g.*, micrograms per square centimeter,[295] or on the basis of relative dietary concentrations.[296] A third scaling factor, originally quite popular, bases comparisons on the relative body weights of the two species.[297] The current preference for the other approaches reflects official conservatism; the use of relative surface area has the effect of increasing estimates of human risk because the disparity in surface area between rodents and humans is relatively less than the disparity in their weights.[298] What little empirical evidence exists, however, suggests that all four of the common scaling factors may modestly overstate human risk.

The attempt to estimate the effects of low doses of a carcinogen from its observed effects at high doses is more controversial than the qualitative extrapolation from animals to man.[299] To make this extrapolation with confidence an agency would need, but almost never has, knowledge of the underlying mechanism by which the substance causes cancer. Moreover, in most cases there are no data from animal exposures at doses corresponding to the human exposure levels that are of regulatory interest. Thus an agency must have some way of estimating risks at doses for which no experimental data exist. In the absence of data, quantitative risk assessment requires that an agency select some biostatistical model for estimating low dose effects. Several mathematical models have been formulated for this purpose.[300] While the models vary widely in their biological rationales,[301] all of them purport to describe the relationship between recorded doses of a carcinogen and the observed incidence of tumors, and then to predict the probable relationship at lower doses.

---

[292] OTA Report at 122; OSHA Carcinogen Policy at 5190–95.

[293] OTA Report at 170.

[294] *Id.* at 169–70; Letter to author from Joseph V. Rodricks, Clement Associates, July 9, 1981.

[295] See OSHA Carcinogen Policy at 5189; P. Hutt. *Unresolved Issues in the Conflict Between Individual Freedom and Government Control of Food Safety*, 33 FDC L.J. 558, 578 (1978).

[296] Rodricks Letter, supra note 336.

[297] *Id.*; OTA Report at 169.

[298] Letter to the author from Marvin Schneiderman, Ph.D., March 28, 1981.

[299] *See* OSHA Carcinogen Policy at 5179; See generally, OTA Report at 157–72.

[300] OTA Report at 160–62.

[301] Rodricks Letter, *supra* note 294.

Most extrapolation models make assumptions about the stochastic properties of the interactions between carcinogens and target organisms. One procedure relies on the classic dose-response relationship derived from pharmacologic studies, which is an S shaped curve, indicating that some organisms in an exposed population are extremely sensitive to toxic agents and others are highly resistent.[302] This relationship led Mantel and Bryan to hypothesize that the dose-response function of a carcinogen can be approximated by a probit curve in the low dose range.[303] Another model starts from the premise that no effect can occur when the dose of a carcinogen is zero and estimates the effects of low exposures by a linear extrapolation from observed positive doses to zero. A third, the so-called "one hit" model, assumes that a single "hit" of a carcinogen can produce a positive response. Any molecule of the substance is regarded as having the same probability of causing the reaction; the cumulative probability of cancer is thus a function of cumulative exposure.[304] The linear model predicts direct straight-line proportionality between dose and effect until the dose decreases to zero.[305] The one-hit model generally produces higher estimates of risk at low doses.[306] None of the models that have gained popularity, however, suggests a threshold dose below which a carcinogen poses no risk of cancer.

Because several extrapolation models enjoy respectable support, a regulator is faced with a difficult choice at the outset. One approach would be to select an extrapolation model on the basis of correspondence with the data in the observable, i.e., high-dose, range. If one model fit the observable data better than others, it might be favored as the best predictor of effects at low doses. Choosing among extrapolation models based on the closeness of "fit" to the available data is rarely possible, however, because the data usually fit several models equally well.[307] The inadequacy of closeness of fit as a criterion for selecting an extrapolation model is illustrated by the results of applying several models to the data derived from a unique animal experiment performed by the National Center for Toxicological Research.[308] This so-called "megamouse study" used 24,000 rodents to measure the effects of 2-acetyl-animofluorine (2-AAF), a known carcinogen, administered at doses an order of magnitude lower than those customarily used in animal bioassays. The final data from the study were statistically fit to the five best-known mathematical models to determine whether "closeness of fit" would provide a basis for preference. While two models could be eliminated, each of the other three was equally compatible with the observed data.[309]

---

[302] See Mantel and Bryan, *Safety Testing of Carcinogenic Agents*, 27 J. Nat'l Cancer Inst. (August 1980).

[303] *Id.*

[304] OTA Report at 161–62.

[305] *Id.*

[306] The probit model does not predict linear risk at low doses.

[307] *See* OSHA Carcinogen Policy at 5184–85; OTA Report at 162.

[308] See Bruce, *Low Dose Extrapolation and Risk Assessment* (1980).

[309] *Id.* at 6.

The choice of an extrapolation model can significantly affect risk estimates. While the familiar models often fail to reveal differences at high doses, they often predict sharply different risks in the low-dose range. This disagreement among the models is illustrated numerically and graphically in Tables 2 and 3, which are based on the NCTR study.[310]

Because it is usually not feasible to prefer one extrapolation model based on its compatibility with observed data, regulatory agencies have relied on other criteria. For a time some espoused the linear model, which assumes that the incidence of cancer will be directly proportional to dose at low exposures.[311]

TABLE II.

PROBABILITY OF OBSERVING NO TUMORS IN AN EXPERIMENT INVOLVING *N* ANIMALS WITH A FOOD CHEMICAL AFFECTING 1% OF POPULATION

N	Probability (%)
500	1
250	8
100	37
50	61
25	78
10	90
1	99

This table illustrates the weakness of animal bioassays in establishing a finding of no effect. When testing a chemical assumed to cause tumors in 1% of the population, a routine group size of 50 would have a 37% chance of showing no tumors. Thus in a single test a "negative result" of no observed tumors would be compatible with both no effect at all or in 61% of the tests with a 1% incidence of tumors. With a group size of 500 the chances of "missing" a carcinogen of the same potency drops to only 1%, making the negative finding more meaningful, but 500 is an outlandish group size for routine animal bioassays.

TABLE III

RANGE OF ESTIMATE "VIRTUALLY SAFE" DOSES*

Extrapolation Model	Virtually Safe Doses, ppb Liver Neoplasm	 Bladder Neoplasm
Probit	250.	33000.
Mantel-Bryan	11.	220.
Multi-Stage	.41	8.8
One-Hit	.36	.80
Linear	.39	.80

*"Virtually safe" defined as a risk of tumor no greater than 1 in 1 million over a lifetime (1/10-6), extrapolated from a study in which mice were administered 2-AAF in the diet for 24 months. Estimates are based on 99 per cent confidence level.

---

[310] *Id.* (Table C is taken from Table 2 in Bruce, Table D from Table 7a).

[311] E.g., IRLG Scientific Principles at 259.

One reason for preferring this model is its so-called "conservatism," *i.e.*, the model is less likely than others to underestimate the numbers of cancers expected as the result of exposure to low doses of a carcinogen.[312] If this were the sole concern, an agency would always select the model that produced the highest estimated risk of cancer so that regulation could prevent the hypothesized "worst case." Regulators, however, have generally tended to seek one extrapolation procedure that can be followed in evaluating all carcinogens. This is not essential; it has been suggested that regulators should use several different models to display the range of potential risk associated with exposure to a carcinogen. In the absence of a powerful desire for flexibility, however, consistency and predictability argue for the selection of a single model so that risk estimates for different substances are readily comparable. This approach facilitates ranking of carcinogens. The agency with the most experience in quantitative risk estimation for carcinogens, EPA, currently favors the multi-stage model, which is claimed to best represent the mechanism of carcinogenesis.[313] Other agencies are likely to follow EPA's lead.

Another way of estimating the effects of low doses is to relate the length of time between exposure and tumor occurrence to experimental dose.[314] This correlation is referred as "time to tumor." The assumption underlying this approach is that not only are very low doses likely to produce few cancers, but most would not be expected to occur during the normal life span of exposed individuals. Routine bioassays do not generally yield time-to-tumor data, however, and agencies have rarely relied on this refinement in quantitative risk estimates. Moreover, recent scholarship suggests that the results of this approach will not differ significantly from those of purely binary models.[315]

Empirical support for quantitative extrapolation is concededly relatively sparse, but not negligible. For most human carcinogens there is corroborative animal data,[316] and for a few, *e.g.*, ionizing radiation,[317] a linear no-threshold curve seems to fit observed human experience. However, benzene and arsenic, both human carcinogens, apparently contradict both necessary extrapolations,[318] suggesting that neither can be relied on with complete confidence. There have been few systematic efforts to compare estimates of cancer incidence derived from animal data with actual human experience, mainly because data are so fragmentary. One study did compare predicted and actual human cancer rates for six substances known to be carcinogenic for both animals and man.[319] The authors found a close correspondence for three of the substances and a fair correspondence for a fourth, aflatoxin. For the remaining two, the animal data substantially overestimated human risk.

---

[312] *Id.*

[313] GMA Petition, *supra* at 120.

[314] OTA Report at 164.

[315] See K. Crump, *Models for Carcinogenic Risk Assessment*, 202 Science 1106 (1978).

[316] OTA Report at 192.

[317] *See* Lave, *The Strategy for Social Regulation* 113–114 (1981). Analogies drawn between physical agents and chemical carcinogens should be cautiously regarded. The entry of radiation into cells is governed by physically predictable laws while chemicals must undergo a series of poorly understood transport and metabolism steps before the critical interaction with the target cells. See, Maugh, *Chemical Carcinogens: How Dangerous are Low Doses*, 202 Science 37, 37 (1978).

[318] See note 226 *supra*; OTA Report at 141–42. There is a preliminary report that animals exposed to high doses of benzene develop leukemia, but only in conjunction with a toxic noncarcinogenic effect, aplastic anemia. This result suggests that the leukemia is a secondary effect of the aplasia, and that the threshold for the aplasia would also be the threshold for the leukemia. See R. Wilson, *Comparison of Carcinogenic Potency in Animals and Man*, (1978); OTA Reports at 170–72.

3. Depiction of Cancer Risks.

Once an agency has selected an extrapolation model, it can be applied to the available toxicological data to derive estimates of the human cancer risk at different exposure levels. At this stage, it is not essential that the agency have information about actual human exposures; an assessment can be expressed in terms of risk per unit dose, as Table 3 illustrates. If the agency desires to estimate the cancer risk associated with a particular type of exposure, e.g., the risk of consuming saccharin-sweetened beverages, it must develop information about the amount of saccharin added to each drink, average daily consumption of saccharin-sweetened beverages, and duration of consumption. Often an agency must make assumptions about probable exposure patterns because reliable data are unavailable. Based on such assumptions, or on available data, the agency can derive an estimate of the human cancer risk posed by an animal carcinogen.

Quantitative risk estimates of this kind are usually presented in one of two forms: as estimates of average individual risk or as estimates of possible cancer incidence in the exposed population. When FDA proposed to ban saccharin, for example, it estimated, based on the now-famous Canadian study in rats and using the linear model, that consumption of artifically sweetened soft drinks increases one's individual risk of bladder cancer by 0.4 percent (from 1.50 to 1.54 percent). The agency also estimated that the additional number of saccharin-caused bladder cancers in the consuming population could range as high as 1200.[320]

One feature of these estimates should be carefully noted. Each represented a ''worst case'' depiction of the risk of consuming saccharin. From a range of estimates statistically supportable by the underlying data, FDA reported the highest figure. In addition, the agency's assessments consciously incorporated exaggerated assumptions about the number of persons who consumed saccharin-sweetened beverages and the amounts they consumed. The resulting risk estimates were termed conservative, in that by design they conveyed the maximum risk of saccharin consumption.

The practice of using the upper confidence limit of extrapolation results to express estimates of human risk is not unique to FDA, but it has been criticized by industry groups as well as by more objective observers of agency decisionmaking.[321] These critics argue that the practice distorts quantitative estimates of risk. This distortion is further exaggerated if the agency also builds in other conservative assumptions, which are multiplied as analysis proceeds.[322] One response to these criticisms is that quantitative risk assessment inevitably involves so many fragile assumptions and uncertainties that prudence dictates a posture favoring human health.

---

[319] See R. Wilson, *supra* note 319; see also NAS/NRC Environmental Studies Board, *Carcinogenesis in Man and Laboratory Animals*, in Pest Control: An Assessment of Present and Alternative Technologies, Vol. I of Contemporary Pest Control Practices and Prospects pp. 66, 82 (1975).

[320] Saccharin and Its Salts, 42 Fed. Reg. 19995 (1977).

It should be emphasized that the numbers produced by quantitative risk assessment are merely estimates of the potential effects of human exposure to a carcinogen; they are not predictions of the number of cancers that the substance will cause. First, the estimates assume a correlation between potency in animals and potency in man that is not verified for most substances. Second, the toxicological data underlying such estimates is often sparse—occasionally only a single study in one species—and thus may not be representative of other species. Finally, the agency has had to extrapolate from data at doses far above those of immediate concern, using models whose biological soundness is unknown.

4. *Uses of Quantitative Risk Assessment.*

Despite its limitations, quantitative risk estimation has exerted a strong appeal on both analysts and regulators. Without some means of describing the magnitude of the health effects associated with exposure to a carcinogen—or of quantifying the health benefits of attempts to reduce exposure—an agency must find some other basis for deciding what controls to require. Legislation occasionally provides an answer. The Delaney Clause, for example, makes quantification of the risk of a carcinogenic food additive superfluous. For any agency that is permitted, or instructed, to weigh the costs and the health consequences of alternative means of controlling exposure, however, another solution is necessary.

The appropriate use of quantitative risk assessment has provoked fierce debate. Industrial interests have generally urged agencies to regard quantification as an essential step in evaluating measures for controlling carcinogens.[323] On the other hand, consumer groups, labor unions, and some members of the public health community have cautioned against excessive reliance on techniques whose reliability remains uncertain.[324] The regulatory agencies themselves for some time had difficulty reaching agreement on the proper role of quantitative risk assessment.[325]

Opposition to quantitative risk assessment stems in part from doubts about its reliability. Critics of the technique also point to the wide range or risks at low doses predicted by the different extrapolation models.[326] Furthermore, they recognize that quantitative assessment of risk facilitates assigning a dollar value to human life. Describing the health benefits of regulation in terms of the number of cancers that could otherwise occur permits calculation of a monetary value for each unit of risk. Regulatory agencies have studiously avoided this calculation, because they fear that it will be misunderstood and question whether it would aid decisionmaking.[327]

---

[321] See Lave, *supra* note 286, at 35–36.

[322] *Id.*

[323] *E.g.*, American Industrial Health Council, Proposal for a Science Panel (1980); GMA Petition, *supra*, at 95–130.

[324] See Letter from Arthur Upton to FDA Commissioner Donald Kennedy, October 1978.

[325] OSHA Carcinogen Policy at 5196–97. "In summary, EPA is the only one of the five agencies whose procedures were discussed in the record which makes quantitative estimates of risk on a regular basis in determining the degree of regulation." Compare IRLG Scientific Principles at 258–59.

Despite these criticisms, quantitative risk assessment can help illuminate many of the choices that agencies confront in regulating carcinogens. For example, the technique facilitates comparison of the risks posed by different substances, which aid in establishing priorities for regulation and permit selection of control levels based on their consistency with prior decisions.[328] Similarly, quantitative risk assessment can illuminate comparisons among regulatory options. For example, to control exposure to a carcinogenic pesticide EPA has several options, including requiring that the pesticide be available only to professional applicators, ordering protective safeguards for such individuals, restricting the crops to which it can be applied or areas in which it may be used, and specifying processing of treated foods. A common metric for measuring the health benefits of these various options can materially advance analysis of a multidimensional decision even if the measurements are readily verifiable and the benefits are not converted into dollars. Perhaps not surprisingly, EPA has been the chief proponent of quantitative risk assessment among the agencies.[329]

For some time, FDA has also been an advocate of quantification. It was the first agency to propose basing permissible human exposure levels for carcinogens primarily on quantitative extrapolation from high dose effects in laboratory animals. This is the thrust of FDA's proposed criteria for the evaluation of carcinogenic animal drugs.[330] The agency has similarly used quantitative risk assessment to explain its decision to approve a carcinogenic hair dye ingredient, concluding that any risk of cancer associated with amounts of the dye that might be absorbed would be negligible.[331]

The CPSC's attitude to quantitative risk assessment has fluctuated. While the agency's staff performed quantitative assessments of the risk posed by several of the carcinogens it first regulated, the Commissioners conspicuously refrained from relying on these estimates to support their decision. In its 1978 cancer policy, subsequently withdrawn, the agency skirted the issue.[332] Later, in an advance notice of proposed rulemaking the Commission announced that it would seek to eliminate all "non-essential" uses of asbestos in consumer products, regardless of the associated level of risk.[333] One year later, in proposing to ban urea formaldehyde (UF) foam insulation because of the cancer risk associated with formaldehyde fumes, the agency referred approvingly to a quantitative risk assessment performed by its staff.[334] These contrasting approaches may simply reflect the Commission's anticipation of a potential problem: quantitative risk assessment requires good data about both carcinogenic potency and human exposure. The CPSC's asbestos notice contemplated a proceeding that could result in a generic ban on the use of asbestos in many consumer products.[335] To make such an initiative dependent on determining the magnitude of the risk of each type of product could stall regulation indefinitely.

---

[326] See note 308 and Table III *supra*; OSHA Carcinogen Policy at 5200–01.

[327] But see 46 Fed. Reg. 11188, 11201–02 (1981), in which the CPSC depicts both dollar costs and estimated lives saved from ban on UF foam insulation.

[328] OSHA Carcinogen Policy at 5200–01.

[329] See, text accompanying note 44 infra, Part II. But see NAS, Regulating Pesticides (1980), which criticizes EPA's reliance on quantitative extrapolation from animal studies to estimate human risk.

[330] See notes 98–100 *supra* and accompanying text.

[331] See note 97 *supra* and accompanying text.

[332] 43 Fed. Reg. 25658 (1978); see Merrill, Consumer Products at 1297–1300.

For most of its existence OSHA was openly reluctant to rely on quantitative risk assessment in setting exposure limits for occupational carcinogens.[336] This reluctance ostensibly stemmed from the agency's interpretation of its statutory duty to eliminate, "to the extent feasible," exposure to substances that might harm even one worker. But there is another explanation for OSHA's position. Quantitative assessment can be used, implicitly or expressly, to assign a dollar value to human lives; OSHA has eschewed any technique that might appear to facilitate sacrificing members of its main political constituency, the labor unions.[337] In its 1980 carcinogen policy, OSHA declined to rely on quantitative risk assessment to set worker exposure levels but contemplated using it for two other purposes: ranking candidates for regulation, and illustrating the residual risk posed by exposure to a substance following implementation of mandated controls.[338]

Even if the results of the 1980 election had not altered OSHA's direction, it is doubtful whether the agency could have continued to eschew quantification in setting health standards for carcinogens. The Supreme Court's decision in the benzene case[339] would have forced some shift. Justice Stevens' opinion does not demand quantification where available data do not permit it; nonetheless, his insistence that OSHA must initially determine whether a carcinogen poses a "significant" risk requires that the agency find some way of describing the magnitude of the health consequences of prevailing worker exposures. The extrapolation procedures described above are the best developed techniques for doing this.

How OSHA will use quantitative risk assessment is less certain. President Reagan's Executive Order directing executive branch agencies to weigh the costs and benefits of regulatory initiatives[340] would ostensibly necessitate some quantification of health effects. But the Supreme Court's refusal to interpret the OSHA Act as requiring cost-benefit analysis[341] dilutes this directive. Labor representatives will argue that the Act's "feasibility" standard, as now construed, precludes balancing, and that quantification is therefore unnecessary in setting exposure limits for carcinogens. On the other hand, the Administration's Task Force on Regulatory Relief may contend that the President can require his subordinates to quantify costs and benefits even if they are not permitted by statute to implement the decisions that such analysis supports.[342] Furthermore, OSHA's new Administrator has been quoted as advocating the use of cost-effectiveness analysis to determine the measures to achieve compliance with desired exposure levels. This approach, if implemented, could also lead the agency to use quantitative risk assessment in setting health standards.

---

[333] 44 Fed. Reg. 60056 (1979); Merrill, Consumer Products at 1351–54.

[334] 46 Fed. Reg. 11188 (1981); Merrill, Consumer Products at 1359.

[335] See *id.* at 1352–53.

[336] OSHA Draft at 95–98.

[337] Interview with Anson Keller, Esq., former Special Assistant to the Assistant Secretary of Labor, August 1980.

[338] OSHA Generic Carcinogen Policy at 5200–01.

[339] *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980).

[340] Exec. Order No. 12291, 46 Fed. Reg. 13193 (1981).

F. Regulatory Assessment of Costs of Controlling Exposure

1. Obligation to Consider Costs.

As observed previously, some statutes do not require an agency to consider any economic consequences before mandating limits on human exposure to a chemical; the agency need consider only whether the substance presents a risk of cancer and whether humans are exposed to it.[343] An agency using a negligible risk standard must go one step further and estimate the magnitude of the risk.[344] Most statutes, however, require that the agency investigate at least some of the consequences of curtailing exposure. The several statutes considered in this study require different effects to be considered and demand varying degrees of analytic rigor. None of them explicitly mandates formal cost-benefit analysis and, to a considerable extent, the scope of the inquiry actually undertaken is within the control of each agency.

Agency statutes are not the only source of directives to consider the costs of regulation. Both the Ford and the Carter Administrations established programs that required executive branch agencies to identify and evaluate certain consequences of their actions.[345] Both programs were concerned with the economic effects of regulatory actions, although the Ford program grew out of an earlier initiative that ostensibly reflected concern for the natural environment as well. President Reagan has issued his own instructions to agencies to consider the economic effects that may flow from their actions.[346] This latest Executive Order differs from its predecessors in two important respects. First, it requires agencies to submit proposed and final regulations, accompanied by their economic analyses, to the Office of Management and Budget prior to publication, thus affording the president's advisers an opportunity to influence their content.[347] Second, it expressly provides that, to the extent compatible with other legal requirements, regulatory actions are not to be taken unless they meet a cost-benefit test.[348] This latter requirement may ultimately prove more influential than the typically more general language of Congress.

---

[341] *American Textile Mfrs. Inst. v. Marshall*, 452 U.S. 490 (1981).

[342] For a skeptical discussion of the authority of the President to require compliance with the requirements of the Reagan Executive Order, see M. Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12291*, 80 Mich. L. Rev. 193 (1981).

[343] *See* text accompanying notes 80-81 *supra*.

[344] *See* text accompanying notes 94-108 *supra*.

[345] *See* generally Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 Mich. L. Rev. 193 (1981); Bruff, *Presidential Power and Administrative Rulemaking*, 88 Yale L.J. 451 (1979).

[346] Exec. Order No. 12291, 46 Fed. Reg. 13193 (1981).

2. *Premises of Cost-Benefit Analysis.*

Two premises underlie the demand for systematic analysis of the effects of regulatory action as an integral part of decisionmaking. The first is the prosaic belief that rational choicemaking ought to be based on full awareness of the consequences. The second is the now vivid awareness, long ago illuminated by the discipline of economics, that society's resources are limited, and that the allocation of a portion of those resources to one objective necessarily displaces others. This perception is implicit in statutory directives to control risks that are "unreasonable" or to take into account specified collateral effects of regulation.[349]

Economic techniques and decision analysis have been used to help make, or to evaluate, governmental decisions for several years. Methods of analysis that originated in the Defense Department during World War II have more recently been employed in such diverse areas as evaluation of water control and reclamation projects, regulation of foreign trade, and assessments of a broad range of social action programs.[350] Cost-benefit analysis is only one method for systematic analysis of alternative courses of action. In its most general form, cost-benefit analysis entails an accounting of all of the positive consequences that can be expected to result from a decision or program, an accounting of all the anticipated negative consequences, and a comparison of these consequences (i.e., costs and benefits) along chosen criteria of measurement.

The theoretical rationale for using cost-benefit analysis in making regulatory decisions can be *easily* summarized briefly. Government regulation exists for the purpose of producing certain desired objectives or preventing certain evils. Many regulatory programs are directed toward stated or understood dominant goals, e.g., protecting consumers from cancer-causing agents in the food supply. If this were society's only goal, any action that reduced the risk of cancer from food would be desirable. But preventing cancer is only one of many societal objectives. Other goals include providing adequate sources of nutrition at a reasonable cost, preventing other food-borne diseases such as botulism, and fostering consumption of products that satisfy consumers. Actions designed to prevent cancer may often impede achievement of these other goals. An action, therefore, should not be evaluated solely in terms of the goal that it furthers, but also in terms of the goals that it sacrifices. By systematically analyzing the costs and benefits of a given course of action, a decisionmaker seeks to determine whether the net achievement of goals is positive.

---

[347] *Id.*

[348] *Id.* at 13193-94.

[349] *See* text accompanying notes 109-31 *supra*.

[350] *See* generally Tribe, *Policy Science: Analysis or Ideology*? in Philosophy and Public Affairs 67 (October 1972); *see* also Report of the Social and Economic Committee of the Food Safety Council, *Principles and Processes for Making Food Safety Decisions*, Chapter 1 (Tent. draft, December 13, 1979).

Cost-benefit analysis is distinguishable from cost-effectiveness analysis. Both share the assumption that a decisionmaker should take into account all of the effects of decisions, but cost-effectiveness analysis makes more limited claims. It does not purport to help the decisionmaker determine whether a goal is worth pursuing; rather, it assists him to identify the least costly way of achieving goals that have already been established.[351] For example, if it were accepted that worker exposure to benzene should be limited to 1 ppm, cost-effectiveness analysis could reveal what combination of methods, e.g., engineering controls, formulation changes, and worker protective equipment, will achieve this level most economically.[352] Cost-benefit analysis, by contrast, theoretically purports to identify which goals are, in economic terms, worth pursuing.

The term "cost-benefit analysis" as used in this study embraces a decisional approach that is sometimes referred to as "risk-benefit analysis."[353] Cost-benefit analysis is potentially applicable to a much broader range of decisions than those in which the main variables are risk to human health on the one hand, and the costs controlling that risk on the other. Risk-benefit analysis can be viewed as a special variety of cost-benefit analysis, applicable, as the term applies, when one of the variables is the possiblity of some harmful event.[354] To avoid possible confusion, only cost-benefit analysis is used here. Within this formulation "cost" will embrace all of the values resulting from the use of or exposure to a carcinogen, including satisfaction likely to be foregone and expenditures necessary to control exposure. "Benefit" will include the health benefits associated with reducing exposure, i.e., the health gain likely to be achieved by limiting or eliminating risk.

3. *Cost-Benefit Analysis in Health Regulation.*

a. *Uses of cost-benefit analysis.* Rigorous cost-benefit analysis requires the decisionmaker to identify all of the outcomes of a contemplated action, assess their likelihood and magnitude, and convert them to a common measure—typically dollars—to determine whether benifits outweigh the costs.[355] Obviously this theoretical ideal is routinely compromised, even in less complex contexts. The inability to anticipate consequences, the lack or cost of information about anticipated effects, and the difficulty of measuring some effects and converting them into a common metric routinely force decisionmakers to settle for much less. Other constraints inhibit government regulators from fully exploiting cost-benefit analysis.[356] Despite these limitations, however, the technique can be useful.

---

[351] *See* Lave, The Strategy of Social Regulation, 19-21 (1981).

[352] Compare *id.* at 90-91.

[353] This approach merges two types of analysis that others have seen as distinct. *See id.* at 17-19; 23-25.

[354] *See* generally Crouch and Wilson, Risk/Benefit Analysis (1982); Lave, *supra*, at 23-24.

[355] *See id.* at 23-25.

Cost-benefit analysis can help describe regulatory decisions. Any action by government trades off costs and benefits, i.e., any action has effects that are not desired even though they may not be large or of official concern. For example, a decision by FDA not to approve a new color additive has the effect, among others, of depriving consumers of another hue in their food—not to mention depriving the manufacturer of a potential market. Thus even a decision that purports to rest on the single criterion of risk in broader sense represents a trade-off between risk avoidance and other values. Anticipated effects are often ignored, either because they are expensive or even embarrassing to assess, or because they are beyond the jurisdiction of the decisionmaker to consider.[357] Some effects remain unexplored because they are not recognized or because no one has the incentive or the means to investigate them.

Cost-benefit analysis can be useful in evaluating decisions made under less rigorous criteria. It provides one framework for critiquing government performance, as it has done for proponents of regulatory reform.[358] Cost-benefit analysis can be used to assess not only specific actions, e.g., the decision to reduce benzene exposure from 10 to 1 ppm, but also the appropriateness of a series of decisions, e.g., all EPA attempts to control carcinogenic pesticides.[359]

Finally, many statutes require agencies to make trade-offs each time they decide whether and how to regulate. For example, EPA must evaluate each pesticide under the "unreasonable adverse effects" standard,[360] most of the economic costs and the health benefits of limiting exposure to a substance. It is for such individual decisions—to approve, ban, or restrict a substance—that this analytical technique is claimed to be particularly useful.

b. *Agency consideration of costs.* None of the four agencies studied here has used classical cost-benefit analysis in making decisions.[361] EPA's approach to regulating carcinogenic pesticides most closely approaches the theoretical model, but still deviates in important specifics. The agency does not pretend to consider all possible consequences of its actions, and it has refrained from attempting to value health and environmental effects in dollar terms. Each of the other three considers a narrower range of costs. However, none of the agencies ignores the costs of restricting exposure to carcinogens.

---

[356] Shortage of time and resources to investigate possible effects that are anticipated explain the failure of many decisionmakers to explore fully all of the ramifications of a decision. For example, FDA has refused to consider the so-called "secondary economic effects" of alternative tolerances for food contaminants, such as the impact on sellers of sport fishing equipment of a reduction in the tolerance for PCBs in fresh-water fish. See Merrill and Schewel, Environmental Contaminants at 1415-23. Inadequacies of agency staff sometimes also limit inquiry. *See id.* at 1425.

[357] For example, in proposing to ban saccharin from food in 1977, FDA did not attempt to identify or measure the economic consequences of such action. *See* Saccharin and its Salts, 42 Fed. Reg. 19996 (1977).

[358] *See, e.g.*, Morrall, *OSHA After Ten Years* (paper prepared for AEI Conference on Health, Safety, and Environmental Regulation, November 1981).

[359] One of the classic studies of this type was Professor Peltzman's evaluation of the impact of FDA's efforts to implement the drug effectiveness requirements of the 1962 Drug Amendments. Peltzman, Regulation of Pharmaceutical Innovation (1974).

[360] *See* text accompanying notes 122-31, 166-84 *supra*.

[361] *See* text accompanying notes 83-87 *supra*.

Costs are considered in many ways. Such consideration may be reflected in an agency's decision not to investigate a chemical, to postpone action and conduct another test, or to request further evaluation of health effects. Sometimes costs are discussed casually in an agency decision that is not subject to effect challenge.[362] Increasingly they are influential because participants in regulatory proceedings, often the agency itself as well as private parties, make substantial efforts to estimate their probability and magnitude. An agency's public statements are an unreliable guide to the weight actually given to costs. FDA's announcement in 1972 that it was again asking the National Academy of Sciences to assess saccharin's carcinogenicity did not mention the decisive consideration that saccharin was the last non-nutritive sweetener.[363] Moreover, even when an agency purports to weigh a wide range of costs as well as possible health benefits, one cannot be sure whether the analysis dictated its choice or simply provided a rationale for an intuitive judgment.

It should come as no surprise that agencies in fact consider consequences which they do not mention and sometimes mention consequences that they do not seriously consider. The health regulatory agencies operate at the intersection between the historical precepts of administrative law and the realities of contemporary government. Much legal scholarship and many judicial decisions support the assumption that regulation is the exercise of expertise applied to facts whose relevance is legislatively determined. The realities of course, are that regulators are selected as much for their predilections as their expertise, that they must make decisions when many facts are unknown and—in the field of immediate interest—unknowable, and that they make discretionary choices between competing values.[364] There thus is a basic tension between the dictates of cost-benefit analysis and the institutional pressures of governing, and agencies vary both in their fidelity to and in their facility with systematic tools for decisionmaking.

4. *Methodology of Cost-Benefit Analysis.*

a. *Determining what costs are relevant.* A threshold issue for any agency responsible for deciding whether to limit chemical exposures is what effects to consider. A major action, such as OSHA's coke oven emissions standard,[365] can have a broad range of short-term and long-term effects throughout the economy.

---

[362] For example, the CPSC's negotiated recall of hairdryers containing asbestos linings was accompanied by very little discussion of the economic effects of its action. *See* Merrill, Consumer Products at 1346-51.

[363] *See* Merrill, *Saccharin: A Regulator's View*, in Crandall and Lave, eds., The Scientific Basis of Health and Safety Regulation 156-60 (1981).

[364] For provocative analyses of the purposes and performance of regulation, *see* Breyer, Reforming Regulation (1982); Noll, Reforming Regulation: An Evaluation of the Ash Council Proposals (1971).

[365] *See* Lave, The Strategy of Social Regulation, 93-98 (1981).

An effort to identify all of the effects and estimate their magnitude would be an endless exercise some selectivity is accordingly essential if decisions are to be reached. Immediate guidance can often be found in an agency's statute. Congress may have specified the kinds of effects that it wanted the agency to consider, as it did in the Consumer Product Safety Act.[366] Or, as in FIFRA, it may have provided a general standard for decision, together with obviously illustrative factors believed pertinent to the general inquiry.[367] Congress' failure to mention criteria that logically seem relevant may betray a decision that they should not be considered.[368] Presidential directives may not only mandate general consideration of regulatory costs but specify which costs are of particular interest. Executive Order No. 12291 enumerates several possible effects of regulatory actions, but they cover so wide a range that it is difficult to identify a category that an agency could confidently exclude.

The Reagan order raises an unresolved issue about the seriousness with which agencies will investigate costs and benefits. It recognizes that some agencies may be constrained by law from according decisional significance to effects that such analysis might reveal.[369] The question is whether an agency that cannot lawfully take into account some, or any, costs of regulation must nonetheless estimate them. Would FDA now be obligated to attempt to measure the effects of banning saccharin on dieters and diabetics even though it may not lawfully consider them? The answer may simply be a matter of intent; arguably the President can require an official in the executive branch to perform any kind of study he considers useful. The question is not merely academic; investigating regulatory costs can itself be expensive of time and resources, and the obligation to perform such agency investigation can therefore inhibit actions as to which costs are not technically relevant.[370]

While this discussion has focused on the negative consequences of restricting human exposure to chemicals, it is appropriate to point out that the benefit side of the equation also embraces a wide range of effects. This study concerns decisionmaking about chemicals whose primary adverse effect is cancer. The specific cases examined involve attempts to estimate the likelihood that exposure to a chemical will cause cancer in humans. But many agents capable of inducing chronic disease can also cause acute toxic effects. In the typical case the chemical is used or occurs at levels well below toxic doses, but this is not invariably true. Pesticides, for example, often must be used at levels that may pose acute risks for applicators. Furthermore, some chemicals are capable of causing other chronic effects, e.g., genetic damage, or congenital deformity. Methods for identifying agents capable of causing such effects or estimating their frequency are far more primitive than the tools for evaluating carcinogens.[371]

---

[366] *See* Merrill, Consumer Products at 1279-80.

[367] *See* text accompanying notes 166-79 *supra*.

[368] It seems highly probable that Congress's failure to instruct FDA to evaluate the utility or benefits of food additives reflected a conscious choice to exclude that criterion from the agency's purview. *See* Merrill, *Regulating Carcinogens in Food: A Legislator's Guide to the Food Safety Provisions of the Federal Food, Drug, and Cosmetic Act*, 77 Mich. L. Rev. 171, 204-09 (1978).

[369] Exec. Order No. 12291 provides that "to the extent permitted by law," agencies shall adopt or repeal rules to maximize net benefits to society and that "regulatory action shall not be undertaken unless the potential benefits to society . . . outweigh the potential costs to society . . . *Id.*, par. 2(b)-(c).

[370] It is possible, of course, that this is one of the objectives of the Reagan executive order.

It should also be noted that some chemicals that pose a health risk also provide health benefits. A much-disputed illustration is sodium nitrite, a substance used to cure meat in order, it is asserted, to prevent the formation of botulinal toxin but one that also may cause tumors in experimental animals.[372] There surely are health benefits directly associated with many rodenticides, not to mention the indirect benefits of more abundant, less costly food resulting from pesticide use. Such health benefits are to be distinguished from the reduction in cancer associated with restricting human exposure to chemicals; they belong on the same side of the equation as the costs of regulation.[373]

b. *Estimating costs*. Under most statutes a central concern is the direct costs of restricting exposure to a carcinogen. Because agency programs provide different kinds of opportunities to curtail exposure, the character of these costs cannot be easily categorized. For example, given the practical impossibility of removing PCBs from fish, the immediate costs of FDA efforts to curtail exposure—by whatever means—will be measured by diminished sales of fish.[374] For OSHA, by contrast, the primary direct costs of control include expenditures for new equipment, process changes, and protective gear for workers.

Before an agency can estimate such costs, it must consider what methods of controlling exposure are realistic options. In theory, many different methods could be used to reduce human exposure to a toxic chemical. These range from mandated information for consumers to process changes, engineering controls, personal protective devices, restrictions on the manner and frequency of use, and prohibition of the use or sale of the substance. Failure to investigate alternative approaches could distort an agency's cost estimates, but some apparently sensible control methods may be beyond an agency's authority to implement. FDA, for example, has no option but to ban carcinogenic food additives.[375] Ostensibly its only means of controlling food contaminants is to condemn overtolerance shipments of food, but presumably it could combine this approach with required label warnings against excessive consumption.[376] Rationing the food, however, would be beyond its authority. On the other hand, EPA may draw on

---

371. *See* generally, NAS, Identifying and Estimating the Genetic Impact of Chemical Environmental Mutagens (1982).

372. *See* NAS, The Health Effects of Nitrate, Nitrite, and *N*-Nitroso Compounds (1981). For such agents, a decisionmaking formula that allowed regulators to balance risks might be appropriate. *See* Lave, The Strategy of Social Regulation 15-16, 48-57 (1981).

373. *See id.*

374. *See* Merrill and Schewel, Environmental Contaminants at 1415-23.

375. *See* text accompanying notes 88-95 *supra*.

376. FDA has rarely used such an approach in regulating harmful agents in food, though the legislation that suspended FDA's authority to ban saccharin mandated a label warning on all saccharin-sweetened foods. *See* Merrill, *Saccharin: A Regulator's View*, *supra*, at 160. And public health authorities in other countries rely heavily on public information techniques in attempting to control the adverse health effects of food contaminants.

several control options to reduce exposure to a carcinogenic pesticide, including use information, regional and crop limitations, use restrictions (e.g., by professional applicators and cancellation i.e., banning).[377] A comparable range of approaches would be available to OSHA, but that agency historically has preferred engineering controls over all other techniques for limiting worker exposure to toxic agents.[378] Other remedies sometimes suggested, such as taxes or other pecuniary incentives, are not currently available to any of the four agencies studied. The significance of this and similar limitations is that an agency will not devote much attention to control options that it cannot implement.

Once an agency has identified the alternative control measures it will consider, it attempts to determine what the costs of each are likely to be. A full-fledged engineering and economic analysis of any option is time-consuming and expensive. Agencies are invariably short of funds to pay for studies and often lack personnel who understand the technology involved. These circumstances provide an incentive for agencies to narrow the range of options considered.[379] None of the agencies studied has authority to mandate the necessary studies by firms responsible for a chemical, but the prospect that an agency can be persuaded to choose, or must choose,[380] a less costly option sometimes elicits such studies. Where compliance is technologically complicated, private businesses and trade groups are the primary sources of data about control costs. Agencies routinely permit the submission of such data, and then have the difficult task of evaluating their reliability.[381]

Process changes, engineering controls, warning labels, and personal protective equipment all involve initial investments, most entail recurrent expense, and some may impose inconvenience, e.g., protective devices for workers. Many investments, however, serve more than one purpose, which should lead analysts to allocate estimated costs between compliance with regulations and the other purposes they serve.[382] Another difficulty in estimating costs stems from the inability to measure technological improvements that are likely to follow imposition of more stringent standards. Estimates based on present information and current technologies will be only rough approximations of what can be expected if new controls are imposed.[383] Thus, not only are cost estimates uncertain, but they are likely to be overestimates for they typically assume that innovation will not yield economies.[384] Furthermore, many exposure controls have resulted in savings of raw materials or finished product which would otherwise have been vented.[385]

---

[377] *See* NAS Regulating Pesticides 131-53 (1980).

[378] *See* OSHA Carcinogen Policy at 5222-27.

[379] *See, e.g.*, Lave, The Strategy of Social Regulation 129-35 (1981).

[380] President Reagen's executive order would require agencies to the extent permitted by law, to choose the regulatory option that imposed the lowest costs on society. *See* Exec. Order No. 12291, par. 2, 46 Fed. Reg. 13193 (1981).

[381] For an illustration of the difficulty of analyzing information about economic effects of regulation, *see* the discussion of OSHA's assessment of the feasibility of its cotton dust standard in *American Textile Mfgrs. Ass'n* v. *Donovan*, 452 U.S. 490 (1981).

[382] *See* Lave, The Strategy of Social Regulation, 36-38 (1981).

[383] *Id.*

[384] *Id.*

In addition to evaluating the direct costs of control options, an agency in theory ought to consider the cost of doing without the final product or paying more for it and the cost of substituting another substance. The first is particularly difficult to estimate, but banning may be the preferred or only lawful means for controlling a substance. One can approach this problem either by estimating the cost of a substitute product which consumers deem equivalent or by estimating how much consumers would be willing to pay to have the product rather than have it banned.[386]

Other indirect costs of regulation may also merit consideration. Substances likely to be substituted for the restricted chemical may themselves entail health risks. For example, several years ago, under pressure from public health experts and regulators, dry cleaning establishments switched to perchloroethylene as their primary cleaning agent, only to learn in 1977 that the CPSC was evaluating this material as a potential carcinogen.[387] With disconcerting frequency, agencies discover that less is known about the toxicity of possible substitutes than about the substance scheduled for regulation.[388] Judgments about the risk of such materials frequently reflect wishful thinking more than careful evaluation of experimental data.[389]

The range of potentially costly secondary effects of regulation is extremely broad. They may include effects on industrial concentration, competition, unemployment compensation expenditures, and local tax revenues. One effect predicted to flow from FDA's adoption of a more stringent tolerance for PCB's in commercial fish is a decline in recreational fishing, with attendant losses for bait sellers, motel operators, and others who earn money from supplying vacationers.[390] Even though FDA's tolerance would not technically apply to fish taken by sport fishermen for their own use, it is difficult to deny—and even more difficult to measure—such secondary effects.[391]

c. *Problems with cost-benefit analysis.* A striking characteristic of decisions by the four agencies is the extent to which their analyses of the implications of specific actions depart from the economist's model. These departures are partly a function of statutory directives that appear, or have been construed, to limit the criteria regulators must consider.[392] But practical as well as theoretical problems with cost-benefit analysis have also discouraged its rigorous use.

---

[385] *Id.*

[386] *Id.* at 39.

[387] *See* Merrill, Consumer Products at 1297-1304.

[388] The fabric treatment TRIS came into wide use after the government had directed fabric makers to assure their products were flame retardent. *See* Merrill, Consumer Products at 1323. The CPSC also considered the potential toxicity of alternatives to benzene in such consumer products as rubber cement. *See id.* at 1343-44.

[389] *Id.*

[390] *See* Merrill and Schewel, Environmental Contaminants at 1415-23.

[391] FDA's position, however, is that it will not attempt to evaluate such effects in setting tolerances or action levels. *See* text accompanying notes 120-121 *supra*.

[392] *See* text accompanying notes 85-86 *supra*; OTA Report at 176-83.

It is acknowledged that in the practical world many decisions do not require, or permit, the kind of careful investigation and quantification of effects that the cost-benefit model dictates. When an agency must act quickly or forfeit any opportunity to intervene, elaborate inquiry is not feasible. When the danger apprehended from a substance is very large, a decision is likely to rest on intuitive judgment. Furthermore, when the persons at risk are identifiable individuals, government rarely pauses to ask whether resources should be spent to protect them.[393] But in regulatory contexts the individuals at risk are rarely readily identifiable;[394] the trade-off that agencies typically confront is statistical lives for dollars that can be used for other societal purposes. Even in such cases, however, regulators have often eschewed systematic analysis of costs and benefits.

One obvious explanation for this anomalous behavior is the expense of formal analysis. Information about costs and benefits is invariably incomplete. Obtaining more inevitably requires money and, as important, time. These are major incentives for both agencies and those affected by their decisions to accept short-cuts and approximations in place of accurate answers. The delay produced by requirements for rigorous analysis—to support more efficient regulation—is dual-edged. When an agency is confronted with a substance to which humans are already exposed, such a requirement impedes the adoption of new controls; when approval for a new product is being sought, however, insistence that the agency be satisfied that the benefits outweigh the costs slows the introduction of new technologies.[395]

The administrative process further amplifies these costs of cost-benefit analysis in a way many economists ignore. Regulation is not only a search for right answers; it is also an exercise in participatory government. The notion that affected individuals and organizations are entitled to ''be heard'' on proposals that may adversely affect their interests is deeply embedded in American law. Some judicial rulings have relaxed this principle: according to the Supreme Court, the requirement for a ''hearing'' can be satisfied by affording an opportunity for the submission of written data and arguments.[396] But other cases have steadily enlarged opportunities for interest group participation in agency decisionmaking. More dramatic has been the growth in complexity of the issues given to regulatory agencies to decide. The result is that any major controversy—and most decisions involving carcinogens fall in this category—can require protracted, expensive proceedings.[397] There will be disputes over what costs are relevant, whether efforts to measure them are competent and honest, and how large they are. The same is true, of course, for the health components of the equation. Each element added to the formula for decision is potentially a separate battleground.

---

[393] It is improbable that anyone performed a cost-benefit analysis of the Carter Administration's efforts to rescue the hostages from Iran before it was undertaken. And similar rescue efforts directed at saving individuals trapped in the mine explosions or imperiled by natural disasters would probably fail a cost-benefit test.

[394] Not only are the numbers of persons at risk often very large, even when the population at risk can be identified—as in occupational settings—those who will be ''saved'' by investments in more stringent safeguards are never known because individual susceptibility usually cannot be determined in advance. Furthermore, in many instances regulators cannot say with certainty that any members of an exposed group *will* get cancer; they can predict only that some percentage *might.*

[395] *See, e.g.*, Peltzman, Regulation of Pharmaceutical Innovation (1974).

[396] *See United States* v. *Florida East Coast Ry.*, 410 U.S. 224 (1973).

On a more prosaic level, the reliability of data and the soundness of estimates or predictions are persistent problems. It is convincingly argued that industry estimates of compliance costs are often exaggerated.[398] The temptation to overstatement is obvious. Moreover, as Lave points out, even the honest firm is confined to existing information and current technology.[399] According to some critics of cost-benefit analysis, decisionmakers tend to accord greater weight to effects that are readily quantified, such as the cost of engineering controls, and less to health effects, which are more elusive.[400] Uncertainty pervades both estimates of the compliance costs and assessments of risk. Where achievement of mandated limits is difficult to monitor or requires the coordinated advertent behavior of many individuals, regulatory determinations of appropriate exposure levels must be recognized as very fragile.

Another recurrent problem is the valuation of qualities or effects that are not customarily measured in dollars. Prosaic examples include the appearance of food, the appeal of special diets, and the satisfaction of having ''burning'' embers in one's living room fireplace.[401] But by far the most controversial such issue is the propriety of assigning dollar values to human life.[402] Rigorous cost-benefit analysis requires the decisionmaker to quantify all significant effects, convert them to a common measure, and then determine whether benefits exceed costs.[403] Economists do not shrink from assigning an explicit value to human lives, e.g., the lives likely to be saved by reducing exposure to a carcinogen. They note that any careful observer of regulatory actions can retrospectively compute the value agencies implicitly placed on lives. Several formulae have been proposed for formally determining what a life is worth.[404]

---

[397] For an analysis of duration and complexity of OSHA proceedings to set standards for occupational carcinogens, *see* McGarity, *The Occupational Safety and Health Administration's Generic Carcinogen Policy: Rulemaking Under Scientific and Legal Uncertainty* (unpublished manuscript prepared for the National Center for Administrative Justice, 1980). *See* also EPA, Pesticide Programs; Rules Governing Rebuttable Presumption Against Registration (RPAR) Proceedings; Rules of Practice Governing Hearings Under Section 6 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 45 Fed. Reg. 52628 (1980) (proposing revisions in increasingly lengthy and costly procedures for pesticide cancellation).

[398] Perhaps the most frequently cited case involved OSHA's proceeding to reduce the exposure limit for vinyl chloride, in which it mandated steps that the industry contended would cost in excess of $2 billion and threaten bankruptcy. Once the standard became final and compliance was attempted, the actual expenditures has shrunk by more than half. *See* Doniger, *Federal Regulation of Vinyl Chloride: A Short Course in the Law and Policy of Toxic Substances Control*, 7 Ecology L.Q. 497, 561 (1978).

[399] Lave, The Strategy of Social Regulation 36-38 (1981).

[400] *See* generally, Swartzman, Liroff, and Croke, eds., Cost-Benefit Analysis and Environmental Regulations, 53-85 (1982).

[401] *See* Lave, The Strategy of Social Regulation 39-41 (1981). *See* generally, Swartzman et al, *supra*, note 400.

[402] *See, e.g.*, Kelman, *Cost-Benefit Analysis—An Ethical Critique*, Regulation, Jan./Feb. 1981; Lave, *supra*, note 401 at 40.

[403] *Id.* at 23-25.

A few government agencies have explicitly assigned lives dollar values in allocating resources to health protection or accident prevention,[405] but most regulators have spurned the very notion. Even EPA, whose analyses of regulatory options have typically been the most comprehensive, has refrained from valuing lives at risk to compare with the costs of control. This reluctance has ethical as well as practical roots. Furthermore, the suggested criteria for computing the value of life, notably discounted future earnings and willingness to pay,[406] produce widely divergent values, and no consensus has emerged in favor of one approach. There is also debate over whether future health benefits should be discounted, in the same fashion as future control expenditures.[407]

There is a more fundamental problem with using formal cost-benefit analysis to set exposure limits for carcinogens. Even if an agency could determine that, in aggregate, the costs of an action outweighed the health benefits, this result would not necessarily dictate that the action should not be taken. None of the statutes examined here expresses a preference for economic efficiency as the prime determinant of regulatory policy. A carcinogen's risks are rarely borne only by those who derive the benefits, and who thus would bear the costs of its control.[408] Exposed workers, to be sure, benefit from jobs that involve the use or production of benzene, but substantial benefits are also enjoyed by other groups who bear none of the risks. There is similar lack of congruence between risk bearers and beneficiaries of consumer products, contaminated food, and pesticides.

Congress might legitimately wish specific agencies to give preferential weight to the risks borne by members of particular groups even if more than offset by the benefits to others. Such a preference, if apparent, could reflect a judgment that maldistributioin of wealth diminished their opportunity to bargain for protection, or that the delayed effect of carcinogens makes it unrealistic to assume that the market will efficiently allocate the costs of preventing the disease. It is often difficult, of course, to discern what theory underlies regulatory legislation, but there is little basis for supposing that Congress wished the agencies invariably to strive for maximum efficiency. Indeed, there is good reason to believe that at least two of the statutes studied—the Occupational Safety and Health Act[409] and the Food, Drug, and Cosmetic Act[410]—embody an emphatic, if imprecise, Congressional preference for preventing harm even at substantial cost.

---

[404] *See, e.g.*, Bailey, Reducing Risks to Life: Measurement of the Benefits, (AEI 1980).

[405] *Id.* at 26.

[406] *See, e.g.*, Kelman, *Cost-Benefit Analysis and Environmental, Safety, and Health Regulation: Ethical and Philosophical Considerations*, in Swartzman *et al*, Cost-Benefit Analysis and Environmental Regulations 137-51 (1982).

[407] *See* Lave, The Strategy of Social Regulation 41-45 (1981).

[408] The congruence between beneficiaries and risk-bearers may be closer for toxic substances encountered in the food supply, such as saccharin; they are probably most remote for agents that disperse and persist in the environment.

[409] *See, American Textile Mfgrs. Ass'n* v. *Donovan*, 452 U.S. 490 (1981).

This perception is surely shared in varying degrees by the four agencies studied. Agency employees have a highly-developed sense that their mission is health protection.[411] Until recently, this sense mirrored the risk-averse posture of a majority of Congress, at least as measured by support for new legisaltion and by oversight hearings that dramatized bureaucratic failures to restrict exposure to risky substances[412] This atmosphere would have discouraged any agency from following a rigorous cost-benefit approach. Recent shifts in public perception of the costs of regulation make such analysis more congenial, but it may also impede adherence to the economists' models. The popularity of ''regulatory reform'' stems only partly from systematic analysis of agency decisions. It reflects as well an untutored conviction that American industry has been excessively burdened by regulation, a conviction that will continue to exert pressure to hold down costs regardless of health benefits.

---

[410] *See,* text accompanying notes 88-94, *supra*; Merrill, Regulating Carcinogens in Food, *supra,* note 368, at 183.

[411] The best evidence of this commitment—or perhaps bias—is the outpouring of criticism of EPA actions and decisions from its own employees during the last 18 months. FDA Commissioner Alexander M. Schmidt encountered similar criticism from within the agency, which was dramatized during hearings before Senator Edward Kennedy's Administrative Practices and Procedures Subcommittee of the Senate Judiciary Committee in 1974 and 1975. *See,* Final Report of the Review Panel on New Drug Regulation (DHEW 1977).

[412] Here again the examples are numerous. One of the best illustrations of the emphatically risk-averse posture espoused by many members of Congress during the 1970's is the final report of the Moss Subcommittee investigation of the performance of nine regulatory agencies, including EPA, FDA, and the CPSC. *Federal Regulation and Regulatory Reform,* Report by the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess. (1976). The climate in Congress began to change following the 1976 election and perhaps was influenced by public reaction to FDA's proposed ban of saccharin.

PART II: PROCEDURES FOR AGENCY DECISIONMAKING

A. Introduction

1. Scope and Organization of Part II.

This part evaluates the existing legal and institutional mechanisms for regulating chemical carcinogens and offers recommendations for their improvement. Some recommendations are directed at individual agencies, others speak to the four agencies collectively, and still others address decisionmaking at the interagency level. The part also discusses possible new institutions, such as the proposed National Science Council which would determine the risk of compounds considered for regulation by any agency.[1]

The following discussion assumes some familiarity with the four agency programs studied. Part I of this report, "The System for Regulating Chemical Carcinogens," describes the scientific and statutory context of toxic chemical regulation in the United States, but does not comprehensively treat each agency program, each of which is the subject of a separate part. Two of these have been published separately: Merrill and Schewel, *FDA Regulation of Environmental Contaminants of Food*, 66 Va. L. Rev. 1357 (1980), and Merrill, *CPSC Regulation of Cancer Risks in Consumer Products: 1972–1981*, 67 Va. L. Rev. 1261 (1981). Drafts of the remaining two parts are available from the Administrative Conference. It should be noted that several recommendations speak to procedures or institutions that are not discussed in earlier parts. Where recommendations go beyond the context previously established, this part provides sufficient background to enable the reader to evaluate them.

Another introductory caveat is in order. To characterize the government's efforts to prevent human exposure to chemical carcinogens as controversial would be extreme understatement. Perhaps no facet of federal regulation occasioned as intense debate during the 1970's. Agency programs have been singled out as imposing excessive costs on the industrial sector,[2] and individual decisions have been challenged as indifferent to control costs.[3] In other quarters, all four agencies have repeatedly been criticized for failure to prevent avoidable disease. Beyond polemics, debate has focused on government's proper role in health protection.[4]

While this report thus deals with agencies whose actions have been the targets of prolonged dispute, it does not address many of the underlying issues. To be sure, in discussing both specific decisions and general programs, the report inevitably suggests views about their appropriateness; its main concern, however, is with the procedures the agencies follow and the competence they display. The report thus does not discuss the extent to which human exposure to carcinogens should be determined by command-and-control regulation rather than market forces. Nor does it endorse cost-benefit analysis as *the* criterion for regulating carcinogens. These obviously important issues are beyond its scope.

---

[1] *See* National Science Council Act of 1980, H.R. 638, 97th Cong., 1st Sess, 127 Cong. Rec. 267 (1981).

[2] J. Morrall, *OSHA After Ten Years*, Preliminary Draft, Ch. 5, pp. 5–7; "Regulation Cost 2.6 Billion for 48 Companies," Washington Post, March 15, 1979.

[3] *Id.*

[4] Nichols and Zeckhauser, *Government Comes to the Workplace: An Assessment of OSHA*, 54 Pub. Int. 39, 55–57 (1979).

At the outset of a necessarily lengthy discussion it is useful to outline the sequence in which topics are treated. Section B describes the common elements of government decisions to regulate a chemical. This description provides a framework for discussing recommended improvements in the regulatory process. The latter portion of Section B attempts to characterize these elements and suggests criteria for evaluating current agency performance and formulating proposals for improvement. Section C considers the means by which agencies identify candidates for regulation. Section D explores the methods they use in evaluating the health risks of toxic chemicals, and specifically considers the values and limits of quantitative risk assessment. Section E examines methods for generating information about, and evaluating, the costs of controlling exposure to carcinogens. It also explores the procedural and administrative implications of cost-benefit decisional criteria. Section F treats issues arising during the formal administrative process, i.e., the stages of agency decisionmaking that are governed by statutorily described procedures, such as those required by the Administrative Procedure Act (APA).[5] Finally, Section G discusses opportunities for, and obstacles to, interagency collaboration in regulating carcinogens. Recommendations for improving agency performance appear throughout.

B. Elements of Agency Decisionmaking

This section establishes a framework for evaluating agency procedures for regulating carcinogens. The framework is a simplified decision sequence, which is based upon the experience of the four agencies studied. This prototype is not a description of administrative procedure, i.e., its elements do not correspond to stages of recognizable legal processes. Rather, it represents a series of findings that are implicit, and often articulate, in any government decision to regulate a chemical. In short, the prototype describes the thought process of government regulators. The formal procedures—rulemaking, adjudication, or licensing—required to implement an agency's analysis sometimes occur contemporaneously, but often they are not commenced until agency decisionmakers have tentatively resolved the issues described below.

1. Discovering Targets for Regulation.

The health hazards that FDA, CPSC, OSHA, and EPA have considered for regulation have come to their attention by different routes. With some oversimplification, these routes can be categorized under four headings:

a. *Report of laboratory test results.* Most candidates for regulation have been identified through experimental findings of carcinogenicity. The CPSC's 1980 proposed ban of UF foam insulation was predicated principally on the results of one experiment, confirmed by a panel of federal scientists, indicating that formaldehyde is carcinogenic for rats and mice exposed by inhalation.[6] Similarly, FDA's ban of chloroform as an ingredient in cosmetics and most drugs was precipitated by a positive bioassay report from the National Cancer Institute.[7] The agency had neglected the possible health hazards of chloroform before the NCI study was reported; its decision to regulate the chemical was a direct response to the study, not the completion of an inquiry begun previously.

---

[5] 5 U.S.C. §§ 551 et seq. (1976).

This pattern of hurried response to unexpected experimental findings is no longer as common. Regulatory agencies are now generally aware of what chemicals are under test by federal laboratories, and have increasing knowledge of testing being conducted within the industrial community as well.[8] Many of the chemicals being tested under government auspices were nominated by one or more of the agencies.[9] Experimental scientists will continue to produce surprises, however, and regulators cannot escape the responsibility—imposed by political pressure as well as by concern for public health—to respond to unanticipated disclosures of apparent health hazards.[10] The global market for chemicals and the internationality of toxicological research make it impossible for agencies to monitor more than a small percentage of ongoing studies.

b. *Discovery of human exposures to, or illnesses caused by, a substance believed to be toxic.* An agency may first become concerned about a toxic substance after some event reveals that humans are exposed to it. For example, FDA first discovered the hazard of polybrominated biphenyls (PBBs) when dairy farmers in Michigan began reporting unexplained illness among their cattle and later investigation identified PBBs as the responsible agent.[11] FDA previously had no reason to think that the chemical might be a contaminant of food and thus had neither looked for it or investigated its toxicity. Reports of unusual human illness associated with exposure to a chemical may also precipitate regulatory attention. OSHA's standard for vinyl chloride was largely a response to the disturbing discovery of an unmistakable association between workplace exposure and angiosarcoma, a cancer rarely found in the liver.[12]

c. *Applications for marketing approval.* An agency's attention may be called to a chemical by an application for marketing approval or a notice of intention to distribute. Under regulatory programs that require proof of safety before a chemical can be marketed, an agency can demand considerable information concerning its potential health effects. The authority to require testing, coupled with the obstacles to approval of any chemical shown to cause cancer in animals,[13] has meant that few new carcinogens have come to agency attention through this route. Only substantial commercial promise will induce a firm to attempt to persuade FDA or EPA than an animal carcinogen should be approved for distribution even if the law theoretically allows it.

---

[6] 46 Fed. Reg. 11188 (1981).

[7] 41 Fed. Reg. 26845 (1976).

[8] The CPSC was advised about the results of the civil study of formaldehyde long before it was completed.

[9] National Toxicology Program, NTP Technical Bulletin 4: 3–6 (1981).

[10] An example is the discovery, by scientists at the Center for Disease Control, of a probable association between use of super absorbent tampons and toxic shock syndrome.

[11] Merrill and Schewel, Environmental Contaminants at 1410–1415.

[12] R. Merrill, Draft of Chapter 4: OSHA Regulation of Toxic Chemicals in the Workplace [hereafter OSHA Draft] at 145.

These incentives have not meant, however, that chemicals requiring premarket approval have not been regulated as carcinogens. The most controversial candidates for regulation have been *approved* compounds whose carcinogenicity was suggested long after commercial introduction. Saccharin, nitrite, cyclamate, DDT, heptachlor and chlordane, and 2,4,5-T all illustrate this phenomenon. In most of these cases, administrative attention was attracted by the discovery of unexpected human exposures or the report of new laboratory findings.[14] While at first glance perplexing, we should not be surprised when a substance previously approved as safe is discovered to be carcinogenic. Standard protocols for chronic testing are now much more thorough, and continued experimentation may expose species or genetic strains of animals that are more sensitive to a chemical than those originally tested.[15]

d. *Systematic review*. The four agencies have often been criticized for their reactive posture toward chemical carcinogens.[16] Concern for public health and a desire to control their own agendas have inspired the agencies to devise systematic ways of reviewing chemicals within their jurisdiction in order to identify those that may warrant regulation. For at least a decade FDA has conducted systematic reviews of the safety, and in some cases the effectiveness, of substances used as ingredients in foods, OTC drugs, and biological products.[17] EPA has largely pursued its own agenda under the RPAR program for registered pesticides.[18] During the 1970's the CPSC responded primarily to targets identified by outside bodies, but in 1979, it established an internal review system, focusing on exposures that might be hazardous as well as chemicals to which consumers might be exposed.[19] OSHA's generic carcinogen policy outlines a system for identifying candidates for new health standards and scheduling regulation of those found to be carcinogenic.[20]

---

[13] Very few animal carcinogens have been approved by government agencies when this information was available to them in advance. Even though the Delaney Clause has very narrow application, few manufacturers would persist in seeking marketing approval for a new substance shown to cause cancer in laboratory animals.

[14] Nitrite, saccharin, and cyclamates to mention only three, all became of regulatory interest as the result of reports of studies in laboratory animals. See R. Merrill, *Regulating Carcinogens in Food: A Legislator's Guide to the Food Safety Provisions of the Federal Food, Drug, and Cosmetic Act*, 77 Mich. L. Rev. 171, 181 (1978) [hereafter Carcinogens in Food].

[15] Correspondence to author from Richard Bates, M.D., Clement Associates, December 31, 1981 [hereafter Bates correspondence].

[16] *See* generally, S. Epstein, *The Politics of Cancer* (1979); EDF and Boyle, Malignant Neglect (1979).

[17] *See* Merrill and Hutt, *Food and Drug Law: Cases and Materials* 70–71, 439–452, and 520–528, (1980).

[18] *See* text accompanying notes 139–144 *infra*.

[19] Merrill, Consumer Products at 1306–1309.

These several avenues by which agencies identify chemicals that become targets for regulation are not mutually exclusive. An agency may have a role in deciding which chemicals are tested, and thus an opportunity to anticipate experimental findings. The report of an industrial accident may converge with laboratory findings that press, and permit, an agency to set control limits, or it may precipitate the testing necessary to assess the new exposure intelligently. Furthermore, even an agency determined to devote its limited resources to the chemicals that it considers most important will be diverted by scientific discoveries and public controversy.[21]

Among the several sources of candidates for regulation, animal experiments have been the most important in recent years. Agency review of substances previously approved or otherwise potentially within their jurisdiction may eventually provide more systematic information and thus enhance the rationality of regulation. It should not be expected, however, that society will soon develop fool-proof systems for detecting human cancer risks. Most of the chemicals to which humans are exposed are not clearly identified; many are of natural origin, the results of combustion, or unidentified contaminants of commercial products. We have not yet discovered how to incorporate these types of materials into our regulatory structure.[22]

The manner in which a chemical comes to official attention significantly affects the adequacy of the data available for evaluating its hazards. The four regulatory agencies do little safety testing of individual chemicals.[23] They participate in the selection of chemicals tested under other federal auspices,[24] and they can influence private decisions about what to test.[25] But most testing of chemicals that are candidates for regulation is done outside government—by university scientists, commercial laboratories, or manufacturers themselves.

If a manufacturer needs government approval before it can commercialize a chemical, the responsible agency is in a position to demand comprehensive testing. If, however, the agency must initiate the process for producing a decision about whether to limit exposure, generally it must rely on less complete data. To be sure, conscientious producers will perform some tests of their own. TSCA's premarket notification requirement[26] may elicit more testing, as well as reporting of tests that are conducted, for chemicals that do not require premarket approval.[27] But these mechanisms are unpredictable and unlikely to produce comprehensive data for individual chemicals or uniform data for any class. It should not be surprising, therefore, that information about the health effects of chemicals that have been regulated has invariably been incomplete and often outdated.[28]

---

[20] OSHA Draft at 87; text accompanying notes 119–130 *infra*.

[21] *See* Merrill, Consumer Products at 1323–1332.

[22] Bates Correspondence at 9.

[23] Only FDA and EPA have authority to require premarket testing, and these powers are limited to certain categories of products. While both agencies have substantial scientific capabilities, they have understandably focused their attention on test methods, rather than specific substances.

[24] National Toxicology Program, NTP Technical Bulletin 4: 3–6 (1981).

[25] Under TSCA, EPA can mandate testing of chemicals. Other programs provide only the opportunity to lobby for industry testing of problem chemicals.

[26] *See* 15 U.S.C. § 2604.

This problem is accentuated when an agency is called on to evaluate a chemical on the heels of an industrial accident or a new laboratory finding. The agency usually has had no opportunity to anticipate what questions it might need answers to, much less commence gathering information. In some cases it may not even know what substance it is dealing with. For example, when illness was first reported among Michigan dairy cattle, the agent responsible was unknown. Once federal and state investigators had determined that PBBs had somehow got into cattle feed, scientists turned to assess the chemical's capacity to cause harm—only to discover a vacuum of information.[29] FDA's initial estimate of the health hazard posed by PBB exposure was therefore based on extrapolation from then-available data on a related compound, polychlorinated biphenyls (PCBs).[30] And its regulatory response was dictated solely by its capacity to detect the chemical.[31] It took several more months to conduct studies of Michigan residents opposed to PBBs, and still longer to complete animal experiments.

Although an unusual case, the PBB episode dramatizes the problems that sometimes confront an agency when a chemical first becomes a candidate for regulation. The adequacy of scientific data for informed risk assessment will vary with the circumstances that focus an agency's attention on a chemical. It is unrealistic to expect that the process for regulating chemical carcinogens will escape these limitations.

2. *Determining Carcinogenicity of Candidates for Regulation.*

After identifying a chemical that is to be considered for regulation, an agency's attention shifts to determining the hazard it poses. In the present context this inquiry can be summarized in the general question: Is a chemical capable of causing cancer in humans? This question embraces several subordinate issues ranging from issues of pure fact (e.g., How many studies of the chemical have been reported? What are their characteristics?), through issues of scientific judgment (e.g., Were the doses administered too high? Are observed lesions cancerous?), to mixed issues of science and policy (e.g., Should benign and malignant tumors be aggregated?).

---

[27] Only food additives, color additives, human and animal drugs, and pesticides currently require premarket approval.

[28] Hutt, Safety Regulation in the Real World, 28 F.D.C.L.J. 460 (1973) [hereafter Regulation in the Real World].

[29] Merrill and Schewel, Food Contaminants at 1412–1414.

[30] *Id.* at 1411.

[31] *Id.* at 1412.

Determining whether a chemical is capable of causing human cancer involves three distinct stages which, in the absence of an emergency, may consume many months or even years. First, the agency must determine what evidence concerning the substance's carcinogenicity is available. Second, it may attempt to generate additional evidence, e.g., by requiring distributors of the chemical to conduct tests, by requesting that another government body conduct tests, or even by conducting tests itself. Finally, having decided that the available evidence is adequate to permit a judgment or that, in any case, the evidence cannot be augmented, the agency must decide whether the chemical can cause cancer in humans.

These analytically distinct steps are often merged in practice. The events that bring an agency's attention to a chemical may include the discovery that exposure is associated with a sharp increase in human cancer. Or test results showing a high probability of carcinogenicity may initially trigger regulatory concern. Moreover, an agency sometimes must decide quickly whether a chemical poses a serious health risk, without any practical opportunity to seek additional evidence. The world of regulation thus differs sharply from the deliberative model.[32]

It is nonetheless useful to keep in mind the distinction between assessment of the adequacy of evidence to permit a judgment about carcinogenicity and interpretation of evidence that is regarded as adequate to permit judgment. Scientific expertise and objectivity are essential in both functions. Deciding whether evidence is adequate requires understanding of the types of studies done to determine carcinogenicity and the technical competence to apply that understanding in evaluating particular studies. But deciding whether the agency should delay a decision for better evidence also requires political sensitivity and awareness of budgetary and legal limitations.[33]

Once it is determined that a decision about carcinogenicity must be reached, the issues to be resolved require primarily scientific judgment. Animal experiments and, when available, human epidemiological studies must be evaluated for adequacy of design, execution, and interpretation of results. Most charcteristics of such evidence are objectively verifiable. It should not be difficult, for example, to determine how many animals were used in an experiment or how many were subjected to pathological examination. Some characteristics may as a practical matter elude verification because evidence about what happened has disappeared, e.g., did animals in the high dose group receive the high dose diet everyday? But the basic parameters of pertinent studies can usually be determined without controversy.

---

[32] *See* Hutt, *supra*, at 467–68.

[33] There is often ambiguity in reports of toxicological studies and always some finite possibility, even if small, that the experimental data, even if unambiguous, may be the result of chance. More testing may strengthen or weaken the evidence. Scientists are well-equipped to describe the strength of the evidence, but not obviously better qualified to determine how strong the evidence should be to justify regulation. This is properly a matter for policymakers, e.g., Congress or the agency. Congress may, for example, indicate a preference in favor of action to control exposure to a substance whose carcinogenicity for scientists remains in doubt.

Interpreting studies whose objective parameters are agreed upon poses more difficult problems. Whether the dose levels administered in an experiment were appropriate is a matter of judgment. Whether a lesion discerned in one organ of a single animal is neoplastic, i.e., is cancerous, is likewise a matter of judgment on which expert pathologists may disagree. Issues of this kind are ubiquitous in the interpretation of carcinogenicity tests, but they are no less scientific issues even though ultimately judgmental.

A third kind of issue that arises in the assessment of carcinogenicity cannot be characterized as purely scientific. Suppose, for example, that experts are evenly divided about whether a study demonstrates a statistically significant increase in tumors among animals exposed to the test chemical. Is the study to be interpreted as confirming carcinogenicity? The issue of what degree of assurance should be required that an apparent association is real is both technical—what is the statistical probability of a false result?—and political—what degree of assurance is required, as a matter of law or policy, to support a decision? Another example of this kind of mixed issue is posed by evidence that a chemical causes benign tumors. Toxicologists can provide experts opinions about the probable correlation between benign tumors and eventual malignancy, for a specific test or generally, but they have no unique claim to deference on the issue of whether benign tumors should, as a matter of policy, generally be equated with malignant tumors in interpreting test results. Resolution of this issue turns in part on considerations in which regulators are more expert—such as intimations of Congressional risk-averseness and the administrative costs of relitigating the issue for each chemical.

This discussion reveals that the issues confronted in determining whether a chemical is capable of causing human cancer are not exclusively scientific. But this caveat should not obscure the fact that they are dominantly scientific. Accordingly, it will be urged later that the internal processes by which agencies make this determination initially *and* the procedures for resolving the issue publicly should feature participation by scientists and elicit conclusions which are couched in scientific terms. These objectives do not necessarily dictate removing evaluations of carcinogenicity from regulatory auspices; they do suggest insulation from policy formation and adversarial contest.[34]

---

[34] *See* NAS/NRC, *Risk Assessment in the Federal Government: Managing the Process* 131–140 (1983) [hereafter Risk Assessment in the Federal Government].

35. The issue can be broken down into several issues, some scientific, some policy: (1) Are the pathologic criteria good enough to distinguish benign from malignant tumors with a high degree of accuracy? This is a question for scientists. If the answer is no, an agency must decide, as a matter of policy, how to deal with the uncertainty. (2) What is the probability that a chemical causing only or mostly benign tumors in one experiment will do the same under all other circumstances? This is a question for scientists. (3) Should the risk of benign tumors be dealt with in the same way as the risk of malignant tumors, assuming that the risks can be distinguished experimentally? This is a question of policy. Comments of Richard Bates, M.D., Clement Associates and formerly FDA Associate Commissioner for Science, December 12, 1981.

3. *Assessing Exposure to Chemicals Targeted for Regulation.*

An essential step in deciding whether to regulate a chemical shown to be capable of causing cancer[35] is to determine whether humans are exposed in a manner that creates cancer risk. Ordinarily this inquiry also entails some attempt to determine the characteristics of exposure, e.g., its route, magnitude, and duration. Measurement or estimation of these characteristics is essential if an agency wishes to quantify the risk posed by a carcinogen.[36]

Despite their obvious importance, however, issues of exposure have often received cursory treatment by regulators. FDA's estimates of human exposure to food contaminants have often rested on scanty residue data and assumptions about the average individual consumption of contaminated food.[37] The CPSC has twice regulated asbestos in consumer products without extensive empirical investigation of human exposure.[38] EPA has devoted greater effort, in conjunction with USDA, to estimating human exposure to pesticides that are candidates for cancellation.[39] OSHA has made significant investments in determining exposure levels when its health standards had to be calibrated to different jobs.

One explanation for the fragile character of many exposure estimates is that reliable data are not readily available from existing sources. In addition, they are rarely easy to obtain. Determining the characteristics of human exposures to chemicals draws on several technical skills, including chemical analysis, engineering, mathematics, and computer modeling. Ideally, actual measurements of human exposure should be made, but constraints of cost, time, and technology often prevent this. For example, FDA cannot practicably measure the amount of PCBs in each fish shipped in interstate commerce. Furthermore, any assay method for a substance has a lower limit of measurement that prevents reliable detection of smaller quantities.[40] And patterns of use and exposure for some products, such as pesticides, may vary so widely that actual measurements at one location or of one population may not be representative of others. Accordingly, in addition to attempting to measure actual use and exposure patterns, agencies rely on mathematical models and similar tools to estimate the characteristics of exposure to carcinogens.

The constraints on reliable estimation of exposure are practical rather than theoretical. It often simply is not feasible to conduct the kinds of investigations necessary to determine exposure patterns to a chemical precisely. But with additional expenditures and improved measurement techniques, it would be possible to narrow the range of uncertainty considerably. Exposure estimates, unlike assessments of carcinogenicity, are based on exposure of the species that is of immediate interest, i.e., human beings. Disputes over carcinogenicity usually center on the implications of data that, though the best obtainable, are inherently deficient. Disputes over exposure tend to revolve around the adequacy of measurements that could be improved.

---

[36] *See* text accompanying notes 321–328 *supra*, Part I.

[37] *See* Merrill & Schewel, Food Contaminants at 1396–97.

[38] *See* Merrill, Consumer Products at 1332–1339, 1346–1351.

[39] *See* text accompanying notes 310–321, *supra*, Part I.

[40] *See* text accompanying notes 322–325, *supra*, Part I. Merrill and Schewel, Food Contaminants at 1397–1398.

Determining exposure can be characterized broadly as a technical exercise. Indeed, theoretically this element is the most susceptible of impartial resolution. While there ordinarily is room for debate about the accuracy of measurements or the adequacy of models, at bottom disagreement is the product of technical judgment rather than controversy over social policy. Experts may differ in their predictions of likely human behavior, e.g., whether pesticide applicators follow label directions, but this kind of disagreement can be resolved through more careful study of actual behavior. Exposure estimates should incorporate a range of error, but they need not embody social judgments.

4. *Quantitative Assessment of Risk.*

Analytically this step follows characterization of human exposures to a chemical; to perform a quantitative assessment of risk, an agency requires both dose-response data for the chemical and information about the extent of human exposure to it. In practice, however, qualitative assessment of carcinogenicity and quantification of the risk posed by different exposures are often performed contemporaneously.[41]

Risk quantification is optional under some regulatory approaches. The CPSC once spurned quantitative risk assessment in regulating carcinogens in consumer products, though more recently it has found the technique useful in determining whether a risk is unreasonable.[42] OSHA has consistently declined to use quantitative risk assessment in setting worker exposure limits for carcinogens.[43] EPA, on the other hand, has long used quantitative risk assessment to set agency priorities, evaluate the risk remaining after application of controls, and to aid comparison of risks and benefits under FIFRA.[44]

Though indeed complex and potentially controversial, quantitative assessment of risk is a data-using rather than fact-gathering exercise. Rather, it combines data on a chemical's health effects and evidence describing the characteristics of exposure to estimate possible cancer incidence under different exposure conditions. It is, in short, a technique for *analyzing and interpreting* data supplied by other disciplines, including toxicology, epidemiology, engineering, and mathematics.

Several elements of this exercise excite sharp disagreement. Some critics have objected to quantitative risk assessment on principle, questioning both the intellectual coherence of the formulas used and the legitimacy of any formula that facilitates assigning a value to human life.[45] But dispute does not end here. Quantitative risk assessment requires two extrapolations that generate disagreement on both technical and policy levels.

---

[41] EPA's Cancer Assessment Group, for example, evaluates the carcinogenicity of substances and prepares a quantitative assessment of risk for all parts of the agency. See Risk Assessment in the Federal Government at 105–109.

[42] Merrill: Consumer Products at 1365–1366; text accompanying notes 377–380, *supra*, Part I.

[43] OSHA Draft at 95–98; text accompanying notes 381–387, *supra*; Part I.

[44] Text accompanying note 374, *supra*, Part I.

First, an agency must choose a formula, or "scaling factor," for extrapolating to man from data obtained in experiments using small rodents who live for perhaps 30 months. Four scaling factors enjoy some support among scientists. The choice of scaling factor depends primarily on scientific criteria, and might vary with the route of human exposure,[46] but it can affect risk estimates by a factor of 40.[47] This disparity may invite demands that an agency select the most "conservative" scaling factor whenever scientific criteria do not dictate a choice.

The choice of a model for extrapolating from high to low doses levels occasions similar debate. Though different biological rationales support the various models, none has elicited consensus among either scientists or regulators.[48] Closeness of fit with the experimental data rarely provides a basis for preferring one model.[49] Because the risks predicted at low doses can diverge by several orders of magnitude,[50] agencies are again pressured to select the most "conservative" model, i.e., the one that is least likely to underestimate risk.

Quantitative assessment of the risk of carcinogens raises numerous other issues of regulatory policy. It is difficult to disaggregate such issues from issues of technical adequacy and scientific judgment at this stage of analysis. So long as agencies leave such issues as the choice of scaling factor and extrapolation model to be resolved in proceedings to regulate individual chemicals it would be difficult to contend that the estimation of the magnitude of the risk posed by a specific substance should be left to scientists.[51]

5. *Evaluating Costs of Control.*

This step in the analysis draws on different skills from those required to evaluate a chemical's risks. Engineering and economics are the primary disciplines involved, but others are also useful because the "costs" of controlling human exposure to chemicals take many forms. Familiarity with technologies for reducing exposure is important in such programs as OSHA's, where direct expenditures for exposure controls—in capital investment and annual maintenance—comprise the primary costs of regulation. For FDA, the main measure of the costs of reducing human exposure to food contaminants is the value of above-tolerance food that cannot be marketed.[52] For the CPSC, the costs range from the value of inventory that can no longer be sold,[53] to loss of future sales,[54] to the increased expense of substitute ingredients,[55] to the lost enjoyment of products for which there is no substitute.[56]

---

[45] Text accompanying note 368, *supra*, Part I.

[46] Office of Technology Assessment, Assessment of Technologies for Determining Cancer Risks From the Environment at 169–170 (1981) [hereafter OTA Report].

[47] *Id.* An agency may, of course, compute the estimated risk of a carcinogen using more than one scaling factor, thus generating a range of possible risks. So doing, however, invites demands that it adopt the formula that yields the highest risk for that substance, unless there are scientific grounds for preferring another. If such grounds exist, it is unclear why the agency would not select that scaling factor in the first instance. The explanation is that there rarely is a convincing scientific basis for adopting one scaling factor and rejecting others.

[48] Currently the linearized multi-stage model seems to have achieved primacy among the regulatory agencies.

[49] OTA Report at 162; text accompanying note 353, *supra*, Part I.

[50] E.g., OTA Report at 163; OSHA, Identification, Classification and Regulation of Potential Occupational Carcinogens, 45 Fed. Reg. 5001, 5184–95 (1980) [hereafter Carcinogen Policy].

[51] OSHA's carcinogen policy was an attempt to resolve these issues once and for all future standard-setting proceedings. Theoretically, adoption of the agency approach would narrow the issues in such proceedings to ones that were primarily scientific. See OSHA Draft at 108–109.

The potential scope of what I have termed "control costs" has often prompted agencies either to narrow the effects they will consider or to perform the inquiry in perfunctory fashion. For example, FDA has announced that it will not consider the "secondary effects" of tolerances for food contaminants, e.g., the indirect but possibly substantial impact on businesses involved in recreational fishing.[57] The CPSC's formal assessment of the economic consequences of banning TRIS-treated garments was cursory,[58] and it gave little attention to the costs of recalling hairdryers insulated with asbestos.[59] On the other hand, OSHA and EPA have both paid increasing attention to the costs of occupational health standards and alternative restrictions on pesticide use. EPA has created a special group of agency economists to evaluate the economic effects of actions taken throughout the agency.[60]

The four agencies have been criticized for underestimating control costs. OSHA's estimate of the cost of compliance with its benzene standard—over $400 million—was approximately one-fifth of the industry's estimate.[61] Similarly, its estimate of the costs of its standard for cotton dust was far lower than the industry's figure, and relied on an industry-financed study whose assumptions and methodology the industry disavowed. Estimates of control costs often vary over a wide range. Disagreement is unrestrained in part because the methods for estimating costs are not so well standardized as the experimental protocols for assessing health effects.[62] Debate also rages over starting assumptions respecting industry structure, suitability of substitute materials, and likely behavior of firms under different control options, and the appropriate rate at which to discount future expenditures.[63]

---

[52] Merrill and Schewel, Food Contaminants at 1392–1398.

[53] *See, e.g.*, Merrill, Consumer Products at 1323–1332.

[54] *See, e.g.*, 46 Fed. Reg. 11188, 11200 (1981).

[55] *See, e.g.*, Merrill, Consumer Products at 1339–1346.

[56] *See, e.g., id.* at 1332–1339.

[57] Merrill and Schewel, Food Contaminants at 1418; 44 Fed. Reg. 38330 (1979).

[58] Merrill: Consumer Products at 1325–1327.

[59] *Id.* at 1349.

[60] *See* discussion of Elizabeth Anderson with NAS Committee on Institutional Means of Risk Assessment, October 13, 1981.

[61] *See* Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 100 U.S. 2844 (1980).

[62] Compare debate over the economic effects of OSHA's standard for vinyl chloride, OSHA Draft at 147–151.

Perhaps the most serious flaw in estimates of control costs is author bias, which the lack of standardized methods of analysis facilitates. Agencies generally are interested in minimizing the economic impact of control measures; producers and distributors have even greater incentives to exaggerate these effects. This problem is aggravated by unequal access to necessary information. Firms that manufacture or use a chemical ordinarily are better equipped than regulators to evaluate substitutes or anticipate technological changes than can dramatically influence the costs of compliance. Moreover, they usually regard data concerning production and sales levels and internal costs as confidential.

Estimating the costs of controlling exposure to a chemical requires sophisticated expertise, but it is also vulnerable to partisan evidence and argument. It therefore should be a product of procedures that permit participation by divergent interests. Furthermore, estimating costs is analytically separate from qualitative and quantitative assessment of risk. This distinction should be punctiliously observed in agency decisionmaking.[64]

6. *Selecting Measures for Controlling Exposure.*

Of the several steps in my prototype analysis, this is the least technical. To be sure, agency decisions should reflect careful study of the character and magnitude of the risk posed by a chemical and of the economic costs of different levels of control. But in the absence of statutory directions to adopt only those controls whose health benefits outweigh economic costs,[65] determining what level of exposure is ''acceptable'' is at bottom a value judgment.[66] Indeed, it is doubtful that a Congressional mandate to adopt only those controls whose benefit-cost ratio is greater than unity would alter the political character of the choices authorized by the programs studied. Methods for evaluating carcinogenicity incorporate judgmental elements, as to models for quantifying risk. The prediction of economic costs of control invariably is open to debate and susceptible to partisan manipulation. An experienced regulator can usually find numbers to support a range of decisions.

If this characterization is roughly accurate, it has implications for the kind of process by which controls measures are chosen. Obviously the process must afford an opportunity for all affected interests to make arguments to the decisionmaker. Personal expertise is likely to be of only modest help; what the regulator needs is access to independent expert advice to inform judgments that may in the final analysis be intuitive.

---

[63] *See* Lave, *The Strategy of Social Regulation* 29, et seq. (1981).

[64] *See* generally Nichols and Zeckhauser at 55–57.

[65] No statute specifically directs such analysis. See text accompanying note 94, *supra*, Part I.

[66] *See, e.g.*, W. Lowrance, *Of Acceptable Risk* at 8 (1976).

C. *Setting Agency Priorities*

As the previous discussion suggests, agencies have chosen chemicals for regulation more often as the result of external events than independent investigation. With increasing awareness of the number of chemicals to which humans are exposed and the proportion that are capable of causing cancer, agencies have become aware of the need to proceed more systematically. This section starts from the assumption that criteria for systematic priority setting can be devised. It also assumes, however, that regulators must also be able to respond to unsolicited information that calls for investigation and possibly for prompt regulatory action. Not only does the public health require flexibility to deal with unanticipated hazards; regulators are subject to political pressures that often will ignore any planned agenda.

1. *Need for Priorities.*

Government efforts to protect the public from chemical hazards include both information gathering (including testing) and exposure control. Both activities require systematic planning, because the potential workload is considerably larger than the resources available to perform either.[67]

The federal government funds many programs that are designed to obtain data about the toxicity of individual chemicals. These data are valuable for regulatory decisionmaking, though they have other uses as well. Basic research in chemistry and the biological sciences aides regulators, but little of it is conducted with regulation in mind—nor should it be. The concern here is with those information gathering activities that are performed or required by the government to assist regulatory decisionmaking. One example is the bioassay program of the National Toxicology Program (NTP). Established in 1978 by then-HEW Secretary Califano, NTP is a coordinating umbrella for toxicological research carried out by diverse components of the Department of Health and Human Services and other government bodies.[68] NTP has assumed responsibility for overseeing most of the long-term and much of the medium-term health effects testing of chemicals performed by the federal government[69]—including the bioassay program previously administered by the National Cancer Institute. This program has become the primary source of federally funded-data about the chronic toxicity of chemicals.

In addition to funding health effects testing, the federal government elicits many of the tests performed by private industry. Because they administer programs requiring premarket approval of new chemicals (e.g., drugs, food additives, and pesticides), FDA and EPA are able to demand considerable testing by industry. This authority is not confined to new compounds. EPA has explicit power to require new tests of already registered pesticides[70] and FDA is often able to elicit private testing of old compounds.[71] Furthermore, under TSCA, EPA also has authority to mandate toxicity testing for chemicals in development or already in distribution, even though they are not subject to premarket approval.[72] The large number of such chemicals makes systematic priority setting for this latter activity crucial.[73]

---

[67] *See, e.g.*, National Research Council, Steering Committee on Identification of Toxic and Potentially Toxic Chemicals for Consideration by the National Toxicology Program, *Strategies to Determine Needs and Priorities for Toxicity Testing: Design* (1981) (hereafter referred to as *NTP Report*).

[68] *Id.* at 1, 5.

[69] *Id.* at 5–9.

The other activity that requires thoughtful planning is the selection of chemicals for evaluation and regulation, e.g., for eventual establishment of new exposure limits. Until recently, most of the chemicals regulated by the agencies studied here were first identified by external events, rather than discovered through systematic planning.

2. *Purposes for Setting Priorities*

Resource limitations are the main reason that agencies require criteria for selecting chemicals for testing and regulation. Society lacks knowledge about the health effects of most chemicals to which humans are exposed. There are exceptions, of course; the health effects of agents used to treat disease are comparatively well understood.[74] Ignorance about the effects of other chemicals is vast, however, and information about human exposure is comparably sparse. For example, we have only rough estimates of the number of man-made chemicals humans are exposed to. The inventory EPA compiled following enactment of the Toxic Substances Control Act includes over 60,000 different compounds, but may yet be an underestimate.[75] There is little reason to think that many of these chemicals will be hazardous in ordinary use, but determining which ones should be more thoroughly tested and evaluated is no easy task.

---

[70] FIFRA § 3(c)(2)(B), 7 U.S.C. § 136a(c)(2)(B) (1976).

[71] FDA has tentatively approved additional uses for a particular compound but on the condition that further testing be conducted (*e.g.*, L-Dopa). The agency also has threatened to terminate the provisional listing of certain color additives absent additional private tests. Merrill and Hutt at 124–30.

[72] TSCA § 4, 15 U.S.C. § 2603 (1976).

[73] In compiling the inventory required by TSCA, EPA has catalogued more than 55,000 substances that are produced in this country or imported and that are used in various phases of chemical manufacture and formulation in the United States. Section 4 of TSCA created the Interagency Testing Committee (ITC) to aid the Administrator of EPA in identifying chemicals already in commerce that should undergo testing for health and environmental effects. The ITC list of chemicals to be tested cannot exceed 50 at any one time, while the ITC updates its roster of chemicals every six months. *NTP Report* at 5, 105.

> "Although TSCA stipulates that the ITC shall rank the chemicals that it recommends for testing, the ITC has chosen not to do so, on the grounds that all designated chemicals are to be of equal priority for testing. The ITC has, however, developed a priority-setting process by which chemicals are initially scored by experts for exposure potential. High-scoring chemicals are then scored for health-effects potential, and the chemicals scoring highest at that stage are scrutinized individually for final selection.

[74] The Federal Food, Drug, and Cosmetic Act [hereafter FD&C Act] § 505, 21 U.S.C. §355 (1976), requires premarket demonstration of safety and efficacy of new drugs, which has meant extensive testing of these agents in both animals and humans. See Merrill and Hutt at 404–09.

Social resources available to test and evaluate chemicals are relatively meager. The cost of single-species bioassay for a chemical now exceeds $500,000. Furthermore, the facilities do not exist to test large numbers of chemicals, and toxicologists and pathologists equipped to design and evaluate animal tests are in short supply.

Resource constraints also limit the selection of chemicals for regulation. No agency has been able to regulate more than two or three controversial chemicals in any year.[76] Regulatory proceedings devour the time of agency scientists, lawyers, and economists at a rate that increases as the process becomes more formal and adversarial.[77] If agencies can regulate only a few chemicals, they must select their targets wisely. Systematic planning may help refute their reputations for unpredictability. In addition, thoughtful selection of candidates for regulation may facilitate coordination among agencies and yield administrative efficiencies.

Rational priority setting would seem equally desirable from the vantage of firms whose activities are targets for regulation. The ranking of candidates for regulation should assist planning of production and equipment repair and replacement. The advantages of systematic priority setting have sometimes been questioned by industry spokesmen. Individual firms and trade groups have vigorously criticized agency proposals to develop criteria for selecting, and announcing, targets for regulation.[78] Their opposition may betray a natural skepticism of any initiative that may make regulation easier. However, many firms also voice separate concern about the commercial impact of public announcements of agency priorities. Pointing out that an agency's announced plan to regulate chemical X does not resolve the issues whether the chemical poses a health hazard or what exposure limits are appropriate, producers contend that the public identification of candidates for regulation can have devastating commercial impact before there is any opportunity to address the merits.[79] This concern must be weighed in designing any program for identifying candidates for regulation.

---

[75] *NTP Report*, at 5. Chemical Manufacturers Association, *The First Four Years of the Toxic Substances Control Act: A Review of the Environmental Protection Agency's Progress in Implementing TSCA* 37–45 (1981).

[76] OSHA, for example, has issued fewer than twenty ocupational health standards since its inception. *See* Risk Assessment in the Federal Government at 97. The chlorobenzilate RPAR proceeding took EPA nearly three years to complete, while the toxaphene RPAR was begun in 1977 and has not yet been concluded. CPSC spent nearly four years developing its "final" regulation declaring vinyl chloride a banned hazardous substance when used in self-pressurized household products. Merrill, Consumer Products at 1311–18.

[77] See OSHA Draft at 22–26.

[78] Comments by industry spokesmen and trade groups are included and discussed throughout the *Federal Register* document containing OSHA's final version of its generic carcinogen policy. 45 Fed. Reg. 5002 (1980). *See, e.g.*, 45 Fed. Reg. 5036 ff., 5067 ff., 5079 ff., 5084 ff., 5094 ff., 5097 ff., 5100 ff., 5105 ff., 5109 ff., 5115 ff., 5118 ff., 5139 ff., 5149 ff., 5153 ff., 5160 ff., 5174 ff., 5179 ff., 5209 ff. It was the CPSC's effort to implement its system for evaluating and classifying chemicals that precipitated the successful court challenge to its own career policy. See Merrill, Consumer Products at 1300–04.

Another rationale has been offered for systematic priority setting. It has been suggested that human health would be better protected if agencies regulated *more* chemicals *less* stringently.[80] The premises of this theory are three: First, it is argued that the risk posed by most chemicals is likely to decline more than linearly with reduced exposure. Second, it is contended, toxic chemicals are likely to combine to produce health effects that are more than additive. Broadening the scope of regulation is a response to the hazards of chemical interaction. Third, less stringent controls are less likely to generate formal challenges at the administrative level and few court proceedings. In consequence, regulations should be able to deal with more potential hazards to health.[81]

3. *Criteria for Setting Priorities*

Considerable thought has been given in recent years to the criteria agencies should employ in selecting chemicals for testing and regulation.[82] This section does not attempt to prescribe precisely the criteria that decisionmakers should follow; it does suggest some of the considerations they should weigh and describes some promising experiments in priority setting.

a. *Selecting chemicals for testing*. The same criteria may not be appropriate for identifying chemicals to be tested and selecting candidates for regulation. In the first context, the primary objective is to reduce ignorance about a chemical's effects; in the second, the objective is to make efficient use of public and private resources for controlling exposure to chemicals found capable of causing harm. This distinction should not, however, obscure the fact that the testing of interest is done primarily to aid regulation.

---

[79] For example, the Society of the Plastics Industry, Inc. made the following post-hearing comment: "First of all, unevaluated lists of substances being considered as potential candidates for regulation as carcinogens should not be treated lightly. While the parties to OSHA's proposed cancer policy proceeding were anxious to see the preliminary categorization, the publication of a list which had not been at all scrutinized is regarded by industry as inappropriate. . . . For example, the erroneous listing of a substance as being under consideration of regulation as a carcinogen can cause the two extremes of public reaction–one, concern about the use of the material and, the other, erosion of the credibility of governmental and other scientists in assessing carcinogenic hazards. In addition the scientific resources of government, industry, and the public are diverted to investigating and rebutting erroneous classifications. Furthermore, the incorrect association of materials, which have been shown to be innocuous and safe for their intended uses, with well known, potent carcinogens can have a detrimental effect on their manufacture, marketing and use. For such reasons, OSHA should take much greater care in this area." 45 Fed. Reg. at 5209.

[80] J. Mendeloff, *Regulation of Toxic Substances: Is Less Better?* (1981) (unpublished draft paper).

[81] *Id.*

[82] *See NTP Report* at 11–34. *See, e.g.*, Weinstein, *Decision Making for Toxic Substances Control: Cost-Effective Information Development for the Control of Environmental Carcinogens*, 27 Public Policy 333 (1979).

A hypothetical example reveals the close relationship between the two functions. Suppose that an agency confronts one hundred chemicals whose toxicity is unknown and which it could order to be tested. If one had reason to suspect that as many as 15 would be found carcinogenic in animal bioassays, it would be desirable to maximize the likelihood of finding those 15 early in the sequence of testing. In such circumstances a negative result would provide less useful knowledge than a positive result. Accordingly, the criteria used in selecting chemicals for testing should enhance the likelihood of identifying the 15 probable carcinogens sooner rather than later, so that regulators could employ the results in making regulatory decisions. This may require coordination between those responsible for selecting which chemicals to test and those responsible for regulation.

There are, however, numerous obstacles to effective coordination. First, regulatory agencies have been slow to develop criteria for identifying candidates for regulation. Any body responsible for choosing chemicals for testing would have difficulty discerning what chemicals agencies were interested in without being told. More important, the universe of chemicals that require testing is not only large but largely uncharacterized; it is not known how much information exists about the chemicals in the universe.

This latter problem has bedevilled the government's major testing effort, the National Toxicology Program, which desires to develop a system for selecting chemicals for testing.[83] Before deciding what criteria should govern this selection the NTP has considered it essential to learn more about the toxicological data base for the entire universe of identified commercial chemicals. That universe consists of approximately 75,000 compounds: some 60,000 from the TSCA inventory plus approved pesticides, approved food additives and GRAS food ingredients, known cosmetic ingredients, and known and approved ingredients of drugs.[84] Much more information is likely to be available about chemicals in the latter groups than about chemicals in the TSCA inventory. At NTP's request, the National Academy of Sciences has undertaken a study to define representative examples of each segment of the universe, evaluate the adequacy of the toxicological data for each segment, and ultimately recommend criteria for selecting chemicals for further testing.[85]

b. *Selecting chemicals for regulation*. Selecting candidates for regulation may be a smaller task, for fewer chemicals are likely to be involved, but is a more subtle one. Agencies have been urged to regulate the ''worst first,'' but this general rubric is difficult to implement. The premise is that a rational regulator would proceed first against the most toxic materials. But the most toxic chemicals are not necessarily the ''worst''; the risk posed by carcinogen depends not only on its potency but also on the number of people exposed to it and the manner, magnitude, and duration of their exposure.

---

[83] *See NTP Report* at 5, 113.

[84] *Id.* at 1, 5.

[85] *Id. passim.*

Before outlining the types of criteria agencies might use in selecting candidates for regulation, some preliminary observations are in order. First, the same criteria may not be appropriate for all four agencies. While the programs studied do not illustrate the full range of federal efforts to regulate toxic substances, they reflect important differences. The most significant is the most obvious; the four agencies have largely distinct jurisdictions. An agency's criteria must fit its jurisdiction. The jurisdictions of the four agencies are defined by medium of exposure (food or consumer products); by location (the workplace); or by chemical use (pesticides). One agency's jurisdiction may be open-ended; and any chemical that may contaminate food is of concern to FDA. Another's may be self-defining; all pesticides distributed in the United States must be registered with EPA. A further distinction is likely to be influential: that between chemicals that are already in the environment or approved for use, and chemicals yet to be developed or awaiting approval. All of the programs studied here have been concerned primarily with chemicals in the former category.

While agency jurisdictions generally do not overlap, many chemicals have uses that bring them within the authority of two or more agencies. This fact has stimulated suggestions that priority setting be done on an interagency basis.[86] An alternative is for each agency to take account of what other agencies are doing in its own setting of priorities. Finally, it should be stressed that all four agencies are concerned about adverse health effects in addition to cancer. Thus, any priority-setting system will inevitably incorporate some effort to evaluate a chemical's capability of causing such effects, perhaps sometimes subordinating potential carcinogenicity as a criterion for concern.

The frameworks suggested for selecting chemicals as candidates for regulation share several common elements. Broadly speaking, they stress three criteria: (1) toxicity, i.e., potential for causing harmful effects; (2) exposure, including number of people exposed, the severity of their exposure, and its duration; and (3) what have broadly been described by one source as "socio-economic considerations," a category that embraces such concerns as availability of substitutes, the cost of control measures, and administrative feasibility. The first two of these address what usually is an agency's central concern: the health risk posed by a chemical.

The health risk posed by a chemical is a function of its carcinogenic potency and of the characteristics of human exposure to it. Precisely because risk is a function of these two criteria, there are two possible starting places for evaluation. EPA, which must approve all pesticides before they may be distributed, can readily identify all such compounds subject to its control. Manufacturers of consumer products, however, need not obtain approval or disclose composition before distribution. For the CPSC to confine its search to lists of chemicals would be foolish. The agency has wisely begun to review consumer products to determine which might pose high risks *if* they contained toxic materials.

---

[86] *See* IRLG, *Notice of IRLG Work Plans and Public Meetings*, 43 Fed. Reg. 7174 (1978).

Theoretically evaluation of exposures would be an important step in priority setting even if an agency knows which chemicals fall within its jurisdiction. A toxic material may present a very low risk if only a few people are exposed at low levels for brief periods of time. Because information about exposure to most chemicals is generally poor, however, this criterion is sometimes neglected.

In addition to the criteria of toxicity and exposure, an agency would be wise to take into account the probable costs of controlling exposure to a chemical. Those costs could be as diverse as those the agency would explore more carefully when it commenced formal regulatory proceedings. This is not to suggest that agencies should refrain from regulating hazardous substances when to do so would impose high costs. But if resistance to regulation is likely to be proportionate to such costs, prudent use of agency resources justifies considering this factor.[87] Another similar criterion is the likely administrative cost of setting and enforcing exposure limits. Agencies should not shrink from contested proceedings when health risks are high, but they should consider their ability to enforce any formal limit they set. It would be imprudent, for example, for FDA to initiate tolerance-setting for a food contaminant that it could not detect using available analytical techniques.

Any priority system should permit an agency to add new candidates promptly. While petitions from interest groups or competitors are not perfect barometers of a chemical's importance, they are not obviously unreliable. Accidents may disclose graver hazards than an agency's advance planning, or political pressures may force a change in priorities.[88] No system should impede response in these circumstances. Having a formal system for selecting candidates for regulation can, however, discourage demands to regulate low risk chemicals.

The criteria suggested—toxicity, exposure, costs and administrability—should also be appropriate for priority setting on an interagency basis. If regulation should address those chemicals that pose the greatest risk, rational priority setting should aggregate all of the settings in which exposure can occur. Other considerations are, however, likely to intrude when agencies with different constituencies collaborate. Jurisdictional jealousies and divergent experience may produce disagreement over what is important. For example, one might expect FDA and USDA to have difficulty agreeing about which food ingredients to control first.[89] Worker awareness of the chemicals around which they work may prevent OSHA from ceding priority to an air pollutant to which a larger population is exposed. Furthermore, joint adherence to the suggested criteria could leave some agencies with only low-ranking candidates. Accordingly, when agencies collaborate in selecting chemicals for regulation, the final list is likely to include each agency's first choice.

---

[87] *See* Merrill, *Regulation of Toxic Chemicals* (Book Review), 58 Tex. L. Rev. 474–75, 476, n.57.

[88] Substances brought to the forefront of regulatory consideration by accident or political pressure include PBBs, DES, 2,4,5-T, benzene, Red No. 2, TRIS, and asbestos in hair dryers.

[89] USDA's principal concern typically would be to increase agricultural production while FDA's emphasis would focus more on public health protection.

4. *Agency Performance in Setting Priorities*

Separate chapters describe how the four agencies identified the chemicals they have attempted to regulate, and reiteration of those descriptions is not necessary here. Some discussion of the agencies' experience and their efforts to establish procedures for priority setting, however, will assist evaluation of pertinent recommendations.

a. *Food and Drug Administration.* The author has studied only one of several programs under which FDA regulates carcinogens: its setting of permissible exposure levels for environmental contaminants of food.[90] Ordinarily these contaminants would not otherwise fall within FDA's jurisdiction; they are not subject to FDA premarket approval or used for other FDA-regulated purposes. FDA has an interest in their health effects only because they get into food, unintentionally and usually accidentally. Accordingly, the agency's method of selecting candidates for tolerances or action levels is calibrated to the circumstances that give rise to its concern.

Candidates for FDA regulation are a product of the agency's efforts to identify foreign substances in food and then seek information about their potential health effects. The latter function has typically been performed by FDA's scientific staff. The agency has never adopted a public system for identifying potential contaminants or eliciting information about their health effects before deciding whether regulation is appropriate. Rather, it has informally explored the scientific literature or consulted with individual scientists to assemble the information necessary to determine what level of regulation is appropriate.[91]

Because FDA has relied almost exclusively on informal action levels rather than formal tolerances, theoretically it has been able to ''regulate'' every contaminant that it has identified, i.e., set a level at which it will seize contaminated food as adulterated. The action level for a chemical can be set at whatever level FDA is prepared to say ''may render'' the food ''injurious to health.''[92] Because its enforcement actions are rarely contested,[93] the agency may even set this level at zero for a contaminant whose health effects are unknown or only poorly documented. The likelihood that it will ever have to support its charge of adulteration is thus small.

The system FDA has devised for assuring the safety of food features regular monitoring of food shipments by inspectors in the field. This system practically requires the agency to have some action level (or tolerance) for every chemical likely to be discovered in food. It cannot respond to federal or state inspectors, who discover contaminated samples, that it has set no level for a particular contaminant because the substance ranks low on its priority list. It must have an answer to the question: Can the food lawfully be distributed?

---

[90] *See* generally, Merrill and Schewel: Environmental Contaminants.

[91] Office of Technology Assessment, *Environmental Contaminants in Food* 37–38 (1979) [hereafter OTA: Food Contaminants].

[92] 21 U.S.C. § 342(a)(1). See Merrill and Schewel, Environmental Food Contaminants.

[93] Merrill and Hutt at 665, 735.

Accordingly, the "priority setting" in which FDA engages consists of deciding which contaminants to search for. Historically, FDA has discovered contaminants through three procedures: (a) routine surveillance sampling of food shipments; (b) special monitoring surveys of particular foods or regions or of specific contaminants; and (c) total diet studies of contaminants found in the average diet, as estimated by so-called "market basket surveys" conducted by USDA.[94] These three mechanisms yield information about not only which chemicals contaminate food but which foods are affected and at what levels.

FDA's criteria for monitoring have recently been criticized by both the Office of Technology Assessment and an intraagency study group.[95] The OTA and FDA's own work group faulted the agency's approach on two main grounds. First, they argued that FDA's routine monitoring programs were too reliant on, and thus circumscribed by, currently available methods of chemical analysis. By gearing its search efforts to existing measurement techniques, according to OTA, FDA was essentially ignoring other criteria such as the potential of chemicals to contaminate food and their toxicity, which are more germane to its main objective of preventing distribution of harmful food.[96] The OTA report recommended that the agency should weight its monitoring activities in favor of health risk and exposure potential, and adjust its efforts to develop or improve analytic methods to these criteria.[97] FDA's own study group also recommended that its total diet study program should be refined to yield information about differential exposures based on age, gender, and special dietary habits.[98]

b. *Consumer Product Safety Commission.* Selecting candidates for regulation has been one of the CPSC's major problems.[99] None of the chemicals that the Commission has attempted to regulate was identified through systematic review of products within its jurisdiction. Each one was the subject of a public petition submitted before the agency acted, though some officials insist that most, if not all, had previously been targeted by the agency's own staff.[100] Congress' recent repeal of section 10 of the CPS Act,[101] which obligated the agency to respond to petitions within 120 days, should eliminate whatever diversion this provision caused.

The CPSC's difficulties in deciding what hazards to regulate have not been attributable solely to the petition process, however, nor have they all been within its control. The CPSC's jurisdiction is enormous and the products potentially subject to regulation present an extraordinary variety of human exposures. The agency lacks an inventory of consumer products, a roster of firms that manufacture and distribute them, and any easy mechanism for forcing disclosure of their composition.

---

[94] Study Group on FDA Residue Programs, *FDA Monitoring Programs for Pesticide and Industrial Chemical Residues in Food* 26–30 (1979) [hereafter FDA Monitoring Programs].

[95] OTA: Food Contaminants at 5, 112.

[96] *Id.* at 112–113; *FDA Monitoring Programs* at 26–28.

[97] OTA: Food Contaminants at 41–42.

[98] *FDA Monitoring Programs* at 23.

[99] *See* Merrill, Consumer Products at 1361–65.

[100] *Id.* at 1363.

[101] *Id.* at 1374.

Recognizing these difficulties, the CPSC in 1979 established an internal working group to identify and evaluate chronic health hazards for possible regulation.[102] The screening group originally concentrated on lists of potential human carcinogens compiled by other bodies, e.g., the list of human carcinogens assembled by the International Agency for Research on Cancer (IARC) and the list of chemicals found positive in NCI bioassays.[103] For each chemical the group planned to resolve, sequentially, a series of legal and scientific issues: (1) agency jurisdiction, (2) carcinogenicity, (3) extent of use in consumer products, (4) probable human exposures, and (5) regulatory options. It is not clear what criteria the group used for selecting from among several hundred listed chemicals those to be subjected to this rather costly review process. The group's plan did not call for Commissioner-level decisions about the priority of specific chemicals until after it has explored the first four of these issues. Under this arrangement, the Commission's staff could invest substantial effort investigating the effects and prevalence of a chemical before learning where it ranked in the Commissioners' larger set of priorities.[104]

In 1979 the Commissioners voted to implement a recommendation from EDF that the chronic hazards screening group should broaden its focus and look at human exposures to consumer products as well as at chemicals identified as potential carcinogens.[105] Since the risk posed by a chemical is as dependent on the route, duration, and magnitude of exposure as on its potency, EDF had argued, the CPSC should also search for products to which consumer exposure could present a serious risk *if* they contained carcinogens.

The CPSC's agenda for fiscal 1982 includes several chronic health hazards. These include UF foam insulation which the agency has recently voted to ban,[106] and asbestos, into whose use the agency began a comprehensive investigation in 1979.[107] It is not clear whether either of these candidates for regulation was identified through the agency's own internal review process. Asbestos had twice previously been a target of Commission action, and both it and formaldehyde were selected for interagency attention by the IRLG.[108] Several substances studied by the screening group had been advanced for review by the Commissioners, only later to recede from their priority list.

---

[102] *Id.* at 1364–65.

[103] *Id.* at 1307.

[104] The chronic hazard program's priorities have always competed for Commission attention with several other types of hazards, even the Commissioners placed them in their annual program plan for special attention.

[105] *Id.* at 1307–08.

[106] *Id.* at 1356–60; [1981] Chemical Regulation Reporter (BNA) 33 (1982).

[107] Merrill, Consumer Products at 1351–54.

[108] IRLG Reports 2(1): 1–5, 17–19 (1980).

It is appropriate to ask whether the CPSC should continue independent efforts to identify chemicals for regulation. It might be a more prudent use of its shrinking resources for the agency to concentrate on chemicals considered for regulation by other agencies with larger scientific staffs and devote its own efforts to determining exposure to, and the risk of, consumer products in which those chemicals occur. The problem with this approach is illustrated by formaldehyde. If sister agencies are reluctant to regulate a substance about whose hazards the CPSC's scientific staff are convinced—perhaps because consumer exposures are higher[109]—adopting a "me too" approach would disable it from regulating. In addition, such an approach would probably damage agency morale.

c. *Occupational Safety and Health Administration.* Until the publication of its generic carcinogen policy in 1980, OSHA had no formal system for identifying candidates for occupational health standards. Petitions from labor unions had preceded the adoption of most[110] of the health standards that OSHA adopted during the 1970's, although each petition had relied upon a criteria document previously prepared by the National Institute for Occupational Safety and Health (NIOSH). It was NIOSH, through preparation of criteria documents, that dictated OSHA's early agenda.[111] By 1976, however, the number of unanswered criteria documents so far exceeded the number of chemicals that OSHA could hope to regulate that NIOSH had ceased to influence the regulators' priorities.[112]

OSHA's decision to set standards for such substances as cotton dust, coke oven emissions, benzene, arsenic were not the product of systematic review of occupational health hazards generally or even of the more limited number of hazardous substances identified by NIOSH. Each standard represents a response to unique pressures.[113] It would be hard to criticize OSHA's decisions to regulate most of these substances. There can be little doubt, for example, that cotton dust and coke oven emissions, to pick two of its most controversial targets, pose serious risks to exposed workers.[114] But this does not answer the question whether another more systematic approach might have enabled the agency to regulate more substances during the same period or with the same expenditure of agency resources—and yielded greater net benefits to worker health.

OSHA's vulnerability to charges that it was not regulating the "worst first" and that it was concentrating too much effort on too few substances partially explain the decision to promulgate the agency's generic carcinogen policy. That policy was not only intended to define the criteria OSHA would follow in evaluating and setting exposure limits for individual chemicals, but to establish a system for developing candidates for new standards. The final January 1980 regulations accordingly set forth a comprehensive system for setting priorities.[115]

---

[109] The CPSC has voted to ban urea-formaldehyde foam insulation. *See* [1982] Chemical Regulation Reporter (BNA). In contrast, EPA has determined that the environmental and health risks posed by formaldehyde do not now justify regulatory action under TSCA. See Risk Assessment in the Federal Government 122–25.

[110] T. Bartman, *Deciding What To Regulate: Priority-Setting at OSHA* (unpublished paper 1981).

[111] *Id.*

[112] *Id. See also* McGarrity, *The Occupational Safety and Health Administration's Generic Carcinogen Policy: Rulemaking Under Scientific and Legal Uncertainty* (unpublished paper prepared for National Center for Administrative Justice, April 1981).

[113] Bartman, *supra.*

[114] *See* OSHA Draft at 161–87.

OSHA officials have reopened the rulemaking proceeding and asked for comments on several portions of the carcinogen policy.[116] Whether and how the agency should set priorities are issues opened to reexamination, and the public ranking scheme described below has been stayed pending review of the comments.[117] Despite debates about its future, OSHA's announced system for selecting chemicals for regulation is the most elaborate devised by any agency. To facilitate understanding of the controversy that this initiative has engendered, it is useful to outline its main features.

OSHA's adoption of a formal process for screening substances and setting priorities was in part a response to public comments on its original proposed carcinogen policy.[118] Several individual witnesses, organizations, and sister agencies urged OSHA to adopt such a system and to make it public. OSHA agreed with the argument that, to the extent practicable, it should regulate the "worst first." However, the agency also insisted that priority-setting should not be so elaborate that it depleted resources for setting standards.[119]

Under OSHA's regulations the first step would be publication of a so-called Candidate List. This list would consist of between 200 and 450 chemicals identified, through review of NIOSH's own list and from other sources, as worthy of further study as potential human occupational carcinogens.[120] While OSHA's review of scientific literature would be cursory at this stage, chemicals would not automatically be included based on NIOSH's recommendations. A chemical's appearance on EPA's Toxic Substances Control Act inventory would be accepted as indicating probable occupational exposure.[121] Evaluations would be performed internally by OSHA staff or by contractors with the agency.[122]

After more thorough review of chemicals on the candidate list, OSHA would make public two priority lists, each containing approximately ten chemicals, characterized as Category I and Category II potential occupational carcinogens.[123]

---

[115] 45 Fed. Reg. 5001 (1980).

[116] 47 Fed. Reg. 187 (1982); *see* [1981] Chemical Regulation Reporter 560 (BNA).

[117] 47 Fed. Reg. 187 (1982).

[118] 45 Fed. Reg. 5002, 5005–07 (1980).

[119] *Id.* at 5011.

[120] *Id.* at 5207–11.

[121] OSHA briefly addressed concerns, expressed by several commentators, that mere listing would stigmatize a chemical in the commercial world before any considered review. The agency dismissed this concern, emphasizing that the chemicals would be subjected to some evaluation before listing and by claiming that the term "candidate" should convey the list's highly preliminary character. *See id.* at 5209.

[122] 45 Fed. Reg. 53672 (1980).

[123] 45 Fed. Reg. 5002, 5206 (1980).

The two categories represent different levels of conviction, based on the supporting scientific evidence, that a chemical is a carcinogen. These lists, to be updated every six months, would comprise the universe of chemicals that OSHA would subject to thorough internal review preparatory to initiating rulemaking.[124] Before including a chemical on either Priority List, OSHA would consider seven criteria: (1) the estimated number of exposed workers; (2) the estimated levels of worker exposure; (3) the levels of exposure reported to cause an increased incidence of neoplasms in humans and/or animals; (4) the extent to which regulation can reduce the risk of cancer; (5) the extent to which the substance has a molecular structure similar to that of another substance which meets OSHA's definition of a potential occupational carcinogen; (6) whether there is evidence that the social and economic costs of regulation would be small; and (7) the relationship of the substance to regulatory activities of other agencies.[125]

OSHA stressed that inclusion of a chemical on either list would not constitute a final agency determination that it was an occupational carcinogen, but merely a judgment that it was a likely candidate for regulation.[126] While new candidates for health standards would ordinarily be selected from one of the two Priority Lists, OSHA disclaimed an intention to following the order of the lists or to confine itself initially to Category I chemicals.[127] It pointed out that the lists reflected considerations, such as ease of control and availability of substitutes, which might justify earlier attention for lower-ranking chemicals.[128]

It should be noted that OSHA's 1980 priority setting system does not contemplate rulemaking to select individual chemicals for regulation. While the agency invited the submission of data concerning chemicals on the Candidate List, it did not obligate itself to consider or reply to any material submitted in response to either the Candidate List or the Priority Lists.[129] Essentially what OSHA's regulations describe is a system for periodically releasing the results of an internal review process. This has fostered complaints from industry organizations that OSHA's process will "indict" chemicals in the public mind before manufacturers or users have an opportunity to be heard.[130] A commitment to more formal public procedures, however, with the attendant obligations to listen and respond, would substantially increase the costs of priority setting. A wholly private process, which did not result in disclosure of the chemicals the agency was considering for regulation, would substantially curtail opportunities for public involvement prior to the standard-setting process itself.

---

[124] *Id.* at 5207–11.

[125] *Id.* at 5210–11.

[126] Obviously attempting to forestall legal challenges to the listing of a chemical, perhaps based on a failure to provide some sort of advance hearing, the agency asserted: "The Priority Lists are not intended to create any legal rights." *Cf.* Dow Chemical, USA v. Consumer Product Safety Commission, 459 F. Supp. 378 (W.D. La. 1978).

[127] 45 Fed. Reg. 5210–11 (1980).

[128] *Id.* at 5210.

[129] *Id.* at 5208.

[130] *See, e.g., id.* at 5209. *See also* note 79 *supra*.

d. *Environmental Protection Agency.*[131] EPA's Office of Pesticide Programs has been engaged in three important activities for which it sets priorities. The agency is responsible for evaluating new pesticides submitted for registration; it has devoted considerable effort to the development of so-called generic standards for regulating marked pesticides; and it has evaluated a comparatively small number of registered pesticides under the Rebuttable Presumption Against Registration (RPAR) process. The latter program, on which EPA's efforts to assess the carcinogenicity of pesticides have been concentrated, is a separate chapter. Some discussion of EPA's techniques for setting priorities for all three activities will illustrate how context and purpose influence this generic function.

The sequence of EPA's evaluation of new pesticides is dictated externally by registration applications from manufacturers and distributors. The universe of new compounds presented to the agency is thus a function solely of private judgments. The agency generally processes applications for registration in the order received, occasionally considering other criteria, such as potential contributions to agricultural production or reductions in risk, in scheduling applications for review.[132]

EPA's registration standards program is an effort to develop generic criteria describing the characteristics of products containing similar active pesticide ingredients.[133] A registration standard is a monograph, issued through rulemaking, which establishes the conditions of approval for products containing a specific pesticide. Promulgation of a standard requires EPA to confirm that toxicological and environmental data concerning the pesticide's properties support the judgment that it will not cause ''unreasonable adverse effects.''[134] Once a standard has been established, manufacturers of products containing the pesticide can secure registration by demonstrating that their products conform to the standard. EPA has been developing these generic standards for several years, but its progress has been slow for several reasons. Notable among these are the vast number of registered products that EPA must examine and the relatively meager scientific data on which to base contemporary judgments about their safety.[135]

EPA has developed informal criteria for selecting pesticide ingredients as candidates for generic standards.[136] These criteria emphasize the scope of pesticide use and potential human and environmental exposure, but priorities are influenced also by the adequacy of available data on health and environmental effects. The agency has no public system for selecting candidates for registration standards; these criteria govern internal decisionmaking by the Office of Pesticide Programs division responsible for developing proposed standards.[137]

---

[131] *See generally*, NRC Regulating Pesticides (1980).

[132] However, applications which come within already existing registration standards can be acted on promptly; those that require additional scientific evaluation or testing inevitably take longer before final approval or rejection. Telephone interview with William Dickinson, Deputy Director, Special Pesticide Review Division, EPA (November 25, 1981).

[133] *See* 44 Fed. Reg. 76311 (1979). *See also* 45 Fed. Reg. 72948 (1980).

[134] FIFRA § 3(c)(5), (g), 7 U.S.C. 136a(c)(5)(g) (1976).

[135] *See* General Accounting Office, *Delays and Unresolved Issues Plague New Pesticide Protection Programs* 4–27 (1980). Interview with William Dickinson, *supra* note 134.

[136] Interview with Janet Auerbach, Director, Regulatory Support Branch, Special Pesticide Review Division, EPA (July 13, 1981).

The third and, in the present context, most important OPP activity is the RPAR program. This is the mechanism by which EPA formally evaluates the risks and benefits of pesticides suspected of posing serious health hazards, including cancer.[138] When it launched the RPAR review process in 1975,[139] EPA's Office of Pesticide Programs had compiled a list of some 40 pesticide ingredients that it regarded as potential candidates for cancellation or curtailed use, primarily because of their potential for causing chronic disease. This list was drawn up by the agency staff without public participation. A variety of criteria influenced their decisions to include a pesticide. The core of the list, perhaps 25 pesticides, came from an earlier listing of "suspect" pesticides based on a 1969 study submitted to the Department of HEW—the so-called Mrak Commission Report.[140] Other pesticides were added to the initial list of RPAR candidates following hasty review of safety data in EPA's files and examination of approved food tolerances, which were assumed to be a proxy measure of the extent of human exposure.[141]

EPA's original universe of RPAR candidates was, thus, drawn from an earlier list of "problem pesticides," supplemented by cursory review of information in the agency's files. According to one EPA official, the pesticides on the list were ranked by the staff according to their toxic potency, their persistence in the environment, total production volume, and a rough assessment of their agricultural importance.[142] This informal ranking has not, however, dictated the sequence in which EPA has evaluated the pesticides; the agency has often moved ahead with substances it considers easy to resolve—either by continued approval or by cancellation. The timing of RPAR actions has also been heavily influenced by external events, including criticism by two Congressional committees and reports of epidemiological studies purporting to demonstrate adverse health effects among exposed humans.[143]

---

[137] *Id.*

[138] Office of Pesticide Programs, EPA, *June 1981 Status Report on Rebuttable Presumption Against Registration (RPAR), Registration Standards, and the Data Call-In Program* (1981).

[139] 40 Fed. Reg. 26802 (1975).

[140] U.S. Department of Health, Education, and Welfare, *Report of the Secretary's Commission on Pesticides and their Relationship to Environmental Health*, Parts I and II (1969). Several of the problem pesticides that the report identified were eventually suspended or cancelled by EPA before commencement of the RPAR review process. See Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971) (DDT); EDF v. EPA, 510 F.2d 1292 (D.C. Cir. 1975) (aldrin/dieldrin); EDF v. EPA, 548 F.2d 998 (D.C. Civ. 1976) (heptachlor/chlordane).

[141] Interview with Steven Jellinek, Former Assistant Administrator for Pesticides and Toxic Substances, EPA (June 23, 1981).

[142] Telephone interview with William A. Wells, Special Assistant to the Assistant Administrator for Pesticides and Toxic Substances, EPA (July 10, 1981).

A 1980 report by the National Academy of Sciences, which studied the RPAR process, criticized EPA for failure to establish a formal, hazard-based system for setting priorities.[144] Whether or not prompted by this report, by 1981 OPP had formed an internal planning group, headed by the Deputy Assistant Administrator for Pesticide Programs, division heads, and representatives of EPA's Office of General Counsel to select candidates for regulatory action.[145] Such action could be inclusion in the registration standards process or scheduling for RPAR review. At this time, however, EPA does not contemplate publishing formal criteria for candidate selection or establishing a system that permits public participation in the selection process.[146]

D. Institutional Mechanisms for Assessing Risk: Advisory Panels

This section and the next one examines a variety of procedures by which regulatory agencies can evaluate the capacity of chemicals to cause cancer. The discussion betrays a conspicuous omission: It does not systematically consider, except by contrasting example, the method most used by regulatory agencies, namely, having staff scientists review the available data and report their conclusions to the agency head. This approach is always available, although its adequacy of course depends on the scientific capabilities of agency staff. It is also the approach likely to be followed in routine cases by all of the agencies, particularly EPA and FDA, which receive a continuous stream of approval applications for new products, new uses for old products, residue tolerances, and similar matters requiring some evaluation of potential human risk.

The focus of these sections is on institutional methods for assessing health risks in major or controversial cases. This section deals with one important approach with which the agencies have had considerable experience, the use of expert advisory panels. Although treated generically, it should be evident from the discussion that advisory panels assume different forms and function in different ways. The following section examines recent proposals for new institutional approaches to risk assessment.

1. Introduction

Advisory panels warrant special attention for several reasons. First, the current agency practice of consultation with expert committees differs in important ways from some proposals to establish a new body for resolving scientific questions, which emphasize separation from agency regulators, centralization, and authoritative resolution.[147] As described here, advisory panels often function as parts of an agency's decisionmaking apparatus, frequently serve a single agency, and provide only advice, not binding decisions. Panel judgments may not be accepted by the agency and, even when they are, theoretically are open to challenge by private parties in whatever formal process the agency must provide. A second reason for treating advisory panels separately is that the four agencies have had a good deal of experience with them. It is therefore possible to describe their operation and to evaluate their performance empirically rather than hypothetically. Furthermore, examples of the successful use of advisory panels provide guidance for the design of any new institutions to assess carcinogenic risks.

---

[143] *See, e.g.*, Staff of Senate Subcomm. on Administrative Practice and Procedure of the Comm. on the Judiciary, 94th Cong., 2d Sess., *Report on the Environmental Protection Agency and the Regulation of Pesticides* (Comm. Print 1976); *Effects of 2,4,5-T and Related Herbicides on Man and the Environment: Hearings Before the Senate Subcomm. on Energy, Natural Resources, and the Environment of the Comm. on Commerce*, 91st Cong., 2d Sess. (1970); Staff of House Subcomm. on Oversight and Investigations of the Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess., *Report on Federal Regulation and Regulatory Reform* 111–51 (1976).

[144] *Regulating Pesticides* at 46–96.

[145] Auerbach interview, *supra* note *138*.

[146] *Id.*

2. *Rationale for Agency Use of Advisory Panels.*

For purposes of this discussion an ''advisory panel'' is any group of experts—whether or not government employees—assembled by an agency to aid it in evaluating the health risks posed by a product or activity. This definition is broader than that of the Federal Advisory Committee Act (FACA),[148] which is addressed to formally chartered committees consisting predominantly of nongovernment members.[149]

While the structure and procedures of agency advisory panels have varied, their use reflects a common rationale: Agencies have found it desirable to obtain the focused views of outside experts on the health risks posed by chemicals that are candidates for regulation. Several advantages have been perceived in such consultation. First, it is sometimes assumed that agency scientists lack the training to provide reliable judgments; in this view, advisory panels supply expertise that the agencies lack.[150] Second, an agency may seek support from the scientific community to bulwark conclusions reached by its own staff; advisory panels can thus enhance the credibility of agency judgments.[151] Third, consultation with an advisory panel may afford an agency time to explore regulatory options or permit industry to develop substitutes, thereby cushioning the impact of regulation.[152] Fourth, consultation with outside experts can dilute the effect of policy biases that, it is believed, often influence agency risk assessments. On this premise, advisory panels contribute objectivity.[153]

---

[147] *See, e.g.*, National Science Council Act of 1980, H.R. 638, 97th Cong., 1st Sess., 127 Cong. Rec. 2, 67 (1981). This bill, popularly known as the Wampler Bill in recognition of its sponsor, was originally introduced as H.R. 6521, 96th Cong., 2d Sess., 126 Cong. Rec. 22, 901–02 (1980). Another proposal for the creation of a science panel has been made by the American Industrial Health Council. ''AIHC Proposal for a Science Panel,'' American Industrial Health Council, March 26, 1980. See generally, Risk Assessment in the Federal Government.

[148] Pub. L. No. 92-463, 86 Stat. 770 (1972), codified at 5 U.S.C. Appendix I (1976).

[149] Agencies have also employed other mechanisms for obtaining guidance and information from outside experts, including contracts with private firms and research organizations and appointment of individual consultants.

[150] This is a conclusion reached by the Office of Technology Assessment in chapter 9 of an as yet unpublished study of the relationship of technological innovation and regulation. *See also* Merrill and Hutt at 907–08.

[151] EPA's Scientific Advisory Panel appears to have strengthened the credibility of the agency's regulation of controversial pesticides by subjecting EPA's own hazard evaluations to disinterested expert review by a panel of nongovernmental scientists. Interview with Steven Jellinek, former Assistant Administrator for Pesticides and Toxic Substances, EPA (June 23, 1981); interview with Philip Gray, Executive Secretary, Scientific Advisory Panel, EPA (July 14, 1981).

One of the most important justifications for the use of advisory panels in assessing chemical hazards is that it institutionalizes "peer review" of laboratory findings, which epitomizes scientific inquiry. As Dr. William Lowrance has written:

> . . . [I]t is only through a rather slow process of cumulative criticism and endorsement by the diaspora of scientists that science grows. Science is, in effect, simply a matter of "voting," with re-balloting conducted from time to time. The scientifically True is no more than what scientists endorse to be true at the moment. Empirical knowledge is developed systematically within the scientific community, subject to criteria of repeatability, controlled observation, statistical significance, openness, and the other guides of Western science. Procedure by itself guarantees nothing, though. Good science is science that "works": science that can predict with consistency and generality and accuracy what will happen in the physical and social world. Weighing of the compellingness of candidate "facts" remains subjective; perfect objectivity is a myth.
>
> Consequently, we must depend heavily on committees and other structured groups of scientists to screen the quality of science used in public decisionmaking. . . .[154]

3. *Approaches to the Use of Advisory Panels.*

A survey of agency experience with advisory panels reveals a variety of forms, procedures, and authorities. This diversity may contribute to suspicions that agencies devise a new approach for each new problem.[155] The impression that regulatory agencies "make up the rules as they proceed" may justify development of some standard procedures, but it should not obscure the importance of allowing agencies to experiment with new approaches to achieve the basic objective—the introduction of independent scientific judgment into agency decisionmaking.

---

[152] FDA bought considerable time by referring the issue of saccharin to the National Academy of Sciences in 1968 and again in 1972. See R. Merrill and M. Taylor, *saccharin* (unpublished manuscript, March 1983).

[153] *See, e.g.*, S. Rep. No. 94-452, 94th Cong., 1st Sess. *reprinted in* [1975] U.S. Code Cong. & Ad. News 1358, for suggestions that EPA's Scientific Advisory Panel would enhance objective scientific analysis within the agency's decisionmaking apparatus. Much the same rationale underlies FDA's use of drug review committees. *See* Merrill and Hutt, *supra* at 907–09.

[154] *See* Risk Assessment in the Federal Government at 127. W. Lowrance, Better Science for Regulatory Decisionmaking, pp. 12–13 (Paper delivered to a Brookings Institution Conference, July 23, 1981).

[155] A central recommendation by the General Accounting Office, following a study of FDA's investigations of possible health hazards caused by nitrites, was that FDA should develop more standardized procedures for risk assessment. GAO, *Does Nitrite Cause Cancer? Concerns About Validity of FDA-Sponsored Study Delay Answer* (Jan. 31, 1980). A similar criticism of past FDA performance appears in a Citizen Petition submitted to FDA by the Grocery Manufacturers of America in August, 1981.

a. *Standing v. ad hoc committees.* An agency may establish, or be required to establish, a single panel to review all its risk assessments. For example, EPA's Office of Pesticide Programs (OPP), is required by statute to consult with a Science Advisory Panel (SAP) on major questions concerning the hazards of marketed pesticides.[156] At the other extreme is an advisory panel created for the purpose of reviewing a single study or a single chemical.[157] The former approach provides continuity and facilitates consistency; the latter approach permits the selection of panelists who possess precisely the expertise needed to evaluate the chemical in question.

b. *Source of members.* Standing panels which advise regulatory agencies typically consist of scientists drawn from outside the government, most from the academic community. Panels assembled to consider a specific chemical, by contrast, have often been composed of government scientists, many of them employed at one or more of its major research facilities, such as NCI, the National Institute of Environmental Health Sciences (NIEHS), or the National Center for Toxicological Research (NCTR). Use of non-government scientists generally enlarges the universe of experts qualified for service and perhaps contributes to the appearance of objectivity. But it also increases cost and usually prolongs the consultative process, for the panel then becomes subject to the requirements of the FACA.[158]

c. *Procedural context.* Advisory panels have been consulted at different stages of the regulatory process and in both rulemaking and adjudicatory proceedings. Probably the most common practice is for an agency to consult a panel before initiating formal regulatory action, e.g., by publishing a notice of proposed rulemaking. In such a case, the committee's findings and its report, if any, become part of the announced basis for the agency's proposal and are subject to challenge in the public administrative process. But an agency may also use an advisory committee after it has initiated regulatory proceedings, perhaps in response to criticism of its initial proposal. This latter approach requires careful scheduling to assure that the public has an opportunity to comment on the panel's findings. Such a panel may even function as the agency's tribunal for hearing and evaluating public comments.

d. *Scope of inquiry.* Agencies have used expert panels to evaluate the risk of individual chemicals based on all available data, but they have also formed ad hoc panels to evaluate single studies. This latter approach has usually been employed only where a chemical has long been a subject of controversy and its effects—apart from the findings of the new study—are well-described. The questions submitted to an advisory panel can range from the narrowly scientific—"Does this latest study indicate that saccharin causes cancer in rats?"[159]—to the broad and policy-dominated—"Considering the experimental data, should this substance continue to be marketed?" Several FDA committees have been asked to answer questions of the latter type for groups of related products.[160]

---

[156] *See* FIFRA §§ 6(b), 25(d), 7 U.S.C. §§ 136d(b), 136w(d) (1976).

[157] At the CPSC's request, the National Toxicology Program established such a panel to evaluate data on formaldehyde, while FDA created a panel devoted to the assessment of Red No. 40. See Risk Assessment in the Federal Government 122–25.

[158] *Id.*

The questions submitted to a panel must be framed to elicit answers that permit an agency to reach a decision, i.e., whether or not to restrict exposure, require more testing, or ignore a chemical. Yet in attempting to structure a panel's response an agency runs two risks. First, it may invite charges that it tampered with the panel's independence. Second, it may introduce into the panel's deliberations legal or policy issues that lie beyond its competence. Despite precautions, however, it is not always possible to confine a panel to the issues posed by the agency.[161] Panel members may regard those issues as incorrect or they may not be content to confine their advice to the "purely" scientific questions that occasion their appointment.

e. *Intra-agency v. interagency panels.* Most panels have been appointed by, and served, a single agency. But there are no insurmountable legal obstacles to creation of interagency expert panels to evaluate chemicals of common concern. In one recent instance, the National Toxicology Program (NTP), assembled a panel of government scientists to evaluate a chronic study of formaldehyde.[162] It was anticipated that the conclusions of this panel would provide a common starting place for all four agenices with jurisdiction over uses of the substance.[163]

4. *Determinants of Agency Approach*

Consultation with advisory panels has not been a routine part of agency evaluation of chemical risks; agencies have generally relied exclusively on their own scientific staffs. For example, OSHA has adopted five health standards since 1977 without once invoking its authority to establish an ad hoc advisory committee.[164] With increasing frequency, however, the four agencies have sought the advice of outside experts and explored ways of institutionalizing scientific "peer review." Several considerations have inspired their interest in independent scientific advice.

---

[159] This was the assignment to the NTP panel on formaldehyde. See note 155, *supra*, and accompanying text.

[160] *See, e.g.*, OTC Drug Review, 21 C.F.R. § 330.10 (1981), and the Biologics Review, 21 C.F.R. § 601.25 (1981); Merrill and Hutt at 439–52, 520–28.

[161] EPA's Scientific Advisory Panel, for instance, has occasionally exceeded its statutory authority to review pesticide health and environmental risks by also considering corresponding benefits of continued pesticide use and specific regulatory options. Interview with Philip Gray, Executive Secretary, Scientific Advisory Panel, EPA (July 14, 1981).

[162] 46 Fed. Reg. 11190 (1981). See Merrill: Consumer Products at 1355.

[163] Interview with Dr. Peter Preuss, CPSC Associate Executive Director for Health Sciences (December 15, 1981).

[164] Interview Charles Gordon, Office of the Solicitor, Department of Labor, June 23, 1981. See generally, Risk Assessment in the Federal Government at 91–93.

Several statutes mandate agency consultation with advisory panels. Since 1975, FIFRA has required OPP to submit proposals to cancel or restrict pesticides to a Science Advisory Panel (SAP), a committee whose members are appointed by the EPA Administrator from nominees submitted by the National Academy of Sciences and National Science Foundations.[165] Recent amendments to the Consumer Product Safety Act require the CPSC to establish a Chronic Hazard Advisory Panel to review the scientific data on any chemical for which it contemplates a standard or ban.[166] The OSH Act does not demand, but it expressly permits the Assistant Secretary for Occupational Safety and Health to establish committees to provide advice on the risks posed by specific workplace hazards.[167] OSHA consulted with such committees before promulgating standards for several chemicals.[168]

Though the issue has never been litigated, it seems clear that, even without statutory authorization, an agency may seek the advice of independent experts by retaining them as consultants, chartering an advisory committee, or consulting with those employed elsewhere in government. Accordingly, without so much as a whisper of Congressional approval, FDA has established the largest entourage of expert advisory committees serving any regulatory agency. These committees have played a central role in FDA's efforts to evaluate the safety and effectiveness of health care products, including prescription and OTC drugs, and biological products.[169] Most of these committees were created to perform functions, e.g., the review of pre-1962 drugs, that were beyond the capacity of FDA's regular staff.[170]

---

[165] FIFRA § 25(d), 7 U.S.C. 136w(d) (Supp. IV 1980) provides in pertinent part:

> The Administrator shall submit to an advisory panel for comment as to the impact on health and the environment of the action proposed in notices of intent issued under section 136d(b) of this title and of the proposed and final form of regulations issued under subsection (a) of this section within the same time periods as provided for the comments of the Secretary of Agriculture under such section 136d(b) and subsection (a) of this section. . . . The Administrator shall also solicit from the advisory panel comments, evaluations, and recommendations for operating guidelines to improve the effectiveness and quality of scientific analyses made by personnel of the Environmental Protection Agency that lead to decisions by the Administrator in carrying out the provisions of this subchapter. The comments, evaluations, and recommendations of the advisory panel and the response of the Administrator shall be published in the Federal Register in the same manner as provided for publication of the comments of the Secretary of Agriculture under such sections. . . . Whenever the Administrator exercises authority under section 136d(c) of this title to immediately suspend the registration of any pesticide to prevent an imminent hazard, the Administrator shall promptly submit to the advisory panel for comment, as to the impact on health and the environment, the action taken to suspend the registration of such pesticide.

[166] Consumer Product Safety Amendments of 1981, Pub. L. No. 97-35, § 1206, 95 Stat. 357 (1981) (amending 15 U.S.C. § 2077 (1976)). The desirability of consultation with expert scientific organizations was a topic of interest in the debate that led to the Medical Device Amendments of 1976. *See* Study Group on Medical Devices, *Medical Devices: A Legislative Plan* (DHEW, 1970), *reprinted in* Merrill and Hutt at 577.

[167] OSH Act, § 7, 29 U.S.C. § 656 (1976).

[168] OSHA Draft at 22, 137.

5. *The Federal Advisory Committee Act.*

Passed in 1970[171] and later amended by the Government in the Sunshine Act,[172] the FACA was intended to regularize the procedures of the several hundred advisory committees established by the federal government during the 1950's and 1960's. A companion objective was to curtail agency reliance on outside advisers who were involved with or employed by regulated enterprises. The origins of the FACA need not be explored in depth here, but it is worthwhile to highlight the Act's basic requirements for creating and operating advisory committees. These requirements not only govern the behavior of bodies covered by the Act but influence the manner in which agencies elicit scientific advice.

The FACA does not either require or prohibit the creation of advisory committees; it thus does not determine when an agency may consult with outside experts. The Act does, however, impose significant requirements for the establishment and operation of bodies that meet its definition of "advisory committee." That broad definition[173] encompasses many of the advisory panels employed by FDA, EPA, OSHA, including most committees whose existence is mandated by other laws, such as FIFRA's Science Advisory Panel.[174]

---

[169] *See* Merrill and Hutt 907–919.

[170] *Id. See also* Note, *Drug Efficacy and the 1962 Drug Amendments*, 60 Geo. L.J. 185 (1971).

[171] Pub. L. No. 92-463, 86 Stat. 770 (1972), codified at 5 U.S.C. Appendix I (1976).

[172] Pub. L. No. 94-409, § 5(c), 90 Stat. 1247 (1976), codified at 5 U.S.C. Appendix I § 10(d) (1976). The brief amendment to the FACA included in the Sunshine Act was intended to ensure that advisory committee meetings remain predominantly open to the public. Original section 10(d) of FACA provided that "Subsections (a)(1) and (a)(3) [requiring open meetings and permitting public participation] shall not apply to any advisory committee meeting which the President, or the head of the agency to which the advisory committee reports, determines is concerned with matters listed in section 552(b) of title 5, United States Code." Amended section 10(d) of FACA reads as follows: "Subsections (a)(1) and (a)(2) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code."

[173] Section 3(2) reads as follows:

> The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is—
> (A) established by statute or reorganization plan, or
> (B) established or utilized by the President, or
> (C) established or utilized by one or more agencies.
> in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of fulltime officers or employees of the Federal Government.

The Act's application to informal arrangements by which government officials obtain advice has been at issue in several cases.[175] The courts have construed the Act broadly to embrace most agency efforts to obtain advice from nongovernment experts.[176] A decision of the Second Circuit, for example, holds that FDA officials' consultation with several academic experts on nutrition who were attending a professional meeting made the group an "advisory committee" under the FACA, and thus subject to its requirements for chartering, public notice of meetings, and open deliberations.[177] It is these requirements, though not individually onerous, that together have sometimes discouraged agencies from soliciting scientific advice or induced them to find other means of exposing staff assessments to outside peer review.[178]

The FACA requires that any advisory committee must be formally chartered by the agency head, with the concurrence of the General Services Administration.[179] A continuing committee must be rechartered every two years.[180] While simple on its face, this procedure has often proved cumbersome. Some agencies lack independent authority to charter committees because department heads have been unwilling to relinquish control over their number and composition.[181] Furthermore, central procedures for screening new committees have imposed lengthy delays, often inspired by political concerns about committee membership or any apparent growth in the number of new federal entities.[182] For example, FDA has had difficulty securing approval for new advisory committees since 1976.

---

[174] *See* note *162, supra*, the CPSC's advisory panels drawn from other governmental agencies are explicitly excluded from FACA's requirements under § 3(2) (C) (iii) of FACA. And under the 1981 amendments to the CPS Act, the CPSC's Chronic Hazard Advisory Panel is explicitly excepted from coverage of the Federal Advisory Committee Act.

[175] *See, e.g.*, National Nutritional Foods Ass'n v. Califano, 603 F.2d 327 (2d Cir. 1979); Consumers Union of United States, Inc. v. Department of HEW, 409 F. Supp. 473 (D.D.C. 1976), *aff'd without opinion*, 551 F.2d 466 (D.C. Cir. 1977).

[176] *Id.*

[177] National Nutritional Foods Ass'n v. Califano, 603 F.2d 327 (2d Cir. 1979) (Friendly, J.). About this decision Judge Friendly has written:

> No one seems even to have considered that in seeking to cure one trouble by imposing procedural requirements, the statute would create others. Just what is an advisory committee? In a recent opinion, where the FDA had consulted with a number of physicians who were attending a meeting of the nearby National Institute of Health, I regretfully found it impossible to accept the Government's position that simply by keeping things informal an agency can escape from a statute whose very purpose is to require formality.
>
> Against this a judge would scarcely wish to say that if on the night of Three Mile Island the NRC wanted to telephone a few eminent atomic scientists, it could not legally have done so. Assuming that a talk with one scientist would not have been subject to FACA, what about a conference call with five? What about a couple of meetings in Harrisburg during the next few days? Beyond this the statute necessitates additional staff in each agency and in the Office of Management and Budget. Would we not have been better off with a bit more trust and less law?

Friendly, *Should We Be Turning Back the Law Flood?*, Legal Times of Washington, Oct. 8, 1979, at 7.

[178] A notable illustration of such alternative peer review is the formation in 1980, at the CPSC's initiative, of a panel of scientific experts from other government regulatory and research agencies to review existing data on formaldehyde and assess the carcinogenic potential of formaldehyde gas leaking from urea formaldehyde foam insulation.

[179] FACA § 9.

[180] FACA § 14.

Once formally chartered, an advisory committee must comply with two requirements designed to assure that advice is provided on the public record. The first of these is the requirement that all meetings be announced in the Federal Register at least 15 days in advance, accompanied by a description of the subjects to be discussed.[183] Desirable in principle, this requirement nonetheless inhibits agencies from seeking outside scientific evaluations when prompt action is required.

The second requirement, clarified by the Sunshine Act,[184] is that meetings must be open to the public except in narrowly defined circumstances which would rarely justify closure of a committee empaneled to evaluate a chemical's risks. This open meeting requirement has proved less disruptive than some agencies initially anticipated,[185] but it has discouraged some scientists from serving on advisory committees. Most members of expert committees are academics, who are accustomed to debating experimental findings unencumbered by cameras, microphones, reporters, and vocal industry and environmental spokespersons. Such intrusions do impede frank exchange or divert it to exchanges outside formal meetings. Allowing committees to meet in private whenever they desired, however, would have other costs.

These FACA requirements have not seriously impeded the work of standing advisory committees, whose responsibility and continuity make compliance a small price for expert advice.[186] But the Act has frequently caused agencies to find other ways of obtaining peer review when the issues before them involve a single chemical or single test. In many such instances, regulators have confined their consultations to other government scientists, who can be made accessible immediately and, if necessary, for extended periods.[187]

One should not discuss the legal restrictions on advisory panels without noting the impact of current federal conflict of interest laws. Members of formal advisory committees are so-called "special government employees," who are subject to same post-employment restrictions as full-time government officials.[188] These restrictions have discouraged some outside scientists from accepting appointment to advisory committees. Perhaps more damaging to the government's ability to secure advice are the rules that forbid a committee member to participate in any matter in which he may have an interest.[189] This limitation, in principle, seems appropriate, but the Department of Justice's interpretation of the phrase, "particular matter," has extended the statute's prohibition to contexts where the potential for personal gain is remote[190] In addition, it is difficult to determine what kinds of financial interests are disqualifying, particulalry for academic scientists whose students, colleagues, and employers are often the recipients of research support from firms with an interest in products on which the panel's advice may be sought.[191]

---

[181] FLA, for example, must obtain approval from the Assistant Secretary for Health and the Secretary of Health and Human Services.

[182] When President Carter entered office, departments and agencies were directed to cut substantially the number of existing advisory committees.

[183] FACA § 10.

[184] *See* note 172 *supra*. FDA's earlier use of advisory committees probably violated this provision of the FACA as amended.

[185] *See* Merrill and Hutt at 918.

[186] A useful example is EPA's Scientific Advisory Panel, which is discussed at texts accompanying notes 264–302 *infra*.

[187] The CPSC followed this procedure with respect to formaldehyde, as did FDA in its evaluation of Red No. 40.

6. *Agency Experience with Advisory Panels*

Each of the four agencies studied has on occasion sought the advice of expert panels about the health risks posed by specific chemicals. The following discussion does not attempt to describe each agency's experience comprehensively. Rather, it selects specific episodes to illustrate the advantages and limitations of this technique for aiding regulatory decisionmaking.

a. *Food and Drug Administration*. FDA's Bureau of Foods has not established a systematic approach to the use of outside experts in evaluating the safety of food constituents,[192] but it has consulted advisory panels on most controversial decisions. In addition, other agency bureaus have for many years relied on expert committees for advice on the composition and labeling of health care products. In testimony before Congress in 1974, FDA Commissioner Schmidt gave several reasons for the agency's use of advisory committees:

> 1. The agency gains access to the highest levels of scholarship in the scientific community and in Federal agencies other than the FDA. . . .
>
> 2. Regulatory decisions are recognized by affected parties as having the backing of leaders in the medical, academic, and scientific communities, all of whom are visible and accountable. . . .
>
> 4. In areas where the Agency lacks intramural competence to deal with a matter in a definitive fashion, participation of selected technical committees or panels permits a prompt and responsive effort. . . .

---

[188] *See* Merrill, *Problems Involving Federal Conflict of Interest Restrictions on Members of FDA Advisory Committees and Agency Officials*, University of Rochester Center for the Study of Drug Development Publication Series (1980).

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *See* Citizen Petition to FDA by Grocery Manufacturers of America, Inc., August 20, 1981, at 76–81.

> 6. Exposure of consultants and committee members to the Agency's deliberations and problems promotes a desirable dissemination of information which might otherwise be confined to official circles. . . .
>
> 7. The incorporation of advisory committees into the review process aids decisionmaking by providing a formal setting for comprehensive review of data, scientific discussion, and resolution of problems.[193]

The importance of advisory panels to FDA is illustrated by their role in the agency's regulation of human drug products. In 1966 the National Acadamy of Sciences, under contract with FDA, assembled some thirty expert panels to review the effectiveness of pre-1962 prescription drugs.[194] In 1972, the agency launched a comprehensive review of the safety and effectiveness of all OTC drugs, in which advisory committees were given the central role.[195] One year later the agency established six additional expert panels to evaluate all human biologicals.[196] The pace of these programs has been slow and their cost to FDA has been substantial, but both pale beside the costs and delays the agency would have encountered if it had attempted these review functions with full-time personnel. Indeed, it is doubtful that FDA could have performed these tasks using only agency personnel.

Each of these product reviews has assigned individual advisory panels to evaluate all of the products or ingredients in a single class. In addition to rendering "verdicts," the OTC drug and biological products panels have also been asked to produce fully-documented reports setting forth their findings and reasons. Successive FDA Commissioners have accepted the vast majority of their recommendations and, though implementation of these recommendations has been slow, none has been challenged in formal proceedings before the agency or in court. One explanation for this acquiescence is that FDA has generally allowed time for manufacturers to substitute new ingredients or revise labeling.

For several reasons, judgments of the panels assembled by NAS to review pre-1962 prescription drugs have been contested more frequently. The members of those panels, virtually all academics, remained anonymous throughout the review process. They met privately. And they produced merely verdicts, e.g., "ineffective," rather than documented reports. Moreover, before implementing judgments of the NAS panels FDA must, by statute, afford manufacturers of allegedly "ineffective" products an opportunity for a formal evidentiary hearing. Manufacturers of profitable products have thus had an incentive to insist on their full legal rights.[197]

---

[193] *Use of Advisory Committees by the Food and Drug Administration: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 93rd Cong., 2d Sess. 13–15 (1974).

[194] Merrill and Hutt at 908–09.

[195] *Id.* at 439 et seq.

[196] *Id.* at 520 et seq.

[197] For a detailed chronicle of FDA's efforts to implement the NAS-NRC findings, see J. Mashaw and R. Merrill, Introduction to the American Public Law System 459–542 (1975); 121–28 (1980 Supplement).

FDA has been less systematic in seeking expert advice on the safety of substances in food.[198] In 1974 the agency created a Toxicology Advisory Committee[199] to which it would refer any scientific question arising under the Delaney clauses.[200] In practice, however, the agency rarely consulted this body[201] and when HEW Secretary Califano ordered a cut-back in departmental advisory committees in 1978, it was dissolved.

During the past decade, FDA has followed several different approaches in evaluating the safety of food constituents. Often it has reviewed these issues internally.[202] On other occasions, it has requested review of an ingredient by the National Academy of Sciences (e.g., saccharin[203]), or by the Federation of American Societies for Experimental Biology.[204] Once it sought advice from the National Cancer Institute (e.g., cyclamate[205]). The agency has also engaged outside experts as ad hoc consultants[206] and has convened informal working groups including both government and outside experts (e.g., FD&C Red No. 40[207]). There is no evident rationale for the agency's choices among these divergent approaches. FDA's varied use of outside experts thus permits evaluation of several different mechanisms of peer review. The following discussion examines three recent episodes in the agency's continuing efforts to regulate food safety.

Cyclamate. In 1969 FDA announced that cyclamate, then one of two available artificial sweeteners[208] could no longer be considered "generally recognized as safe" because recent experiments indicated that it might cause cancer. This decision effectively banned the ingredient from food.[209] Subsequently, the manufacturer submitted a food additive petition seeking reapproval of cyclamate, arguing that the earlier tests had been misinterpreted and that extensive studies demonstrated convincingly that it was safe.[210] Because of the complexity of the scientific questions and the public controversy surrounding cyclamate, the FDA Commissioner asked the National Cancer Institute to empanel a group of scientists to review and evaluate the data.

---

[198] The history of FDA's consultation with outside experts on the safety of substances in food is discussed in detail in the Citizen Petition by the Grocery Manufacturers of America, *supra* note 192, at 76–82.

[199] 39 Fed. Reg. 44473 (1974).

[200] 40 Fed. Reg. 40682, 40710 (1975), 21 C.F.R. 14.19. This regulation was inadvertently omitted from the republication of Part 14 in 44 Fed. reg. 22318, 22351, 22353 (1979) and thus also from the subsequent C.F.R., but has not been revoked and remains in effect today.

[201] 43 Fed. Reg. 30271 (1978).

[202] *See* 37 Fed. Reg. 26618 (1972); 38 Fed. Reg. 20723 (1973); 43 Fed. Reg. 10551 (1978); 39 Fed. Reg. 26748 (1974); 41 Fed. Reg. 19207 (1976).

[203] The National Academy of Sciences reviewed the safety of saccharin for FDA in 1955, 1968, 1970, 1974, and 1978. National Academy of Sciences, *Saccharin: Technical Assessment of Risks and Benefits* 1-6 to 1-8 (1978).

[204] 38 Fed. Reg. 20053, 22054 (1973).

[205] 41 Fed. Reg. 43754 (1976).

[206] 38 Fed. Reg. 12642 (1973); 39 Fed. Reg. 17343 (1974). FDA's ad hoc effort to obtain advice from consultants on the safety of protein supplements was held to violate the Federal Advisory Committee Act. National Nutritional Foods Ass'n v. Califano, 603 F.2d 327 (2d Cir. 1979).

[207] 42 Fed. Reg. 8005 (1977); 42 Fed. Reg. 61630 (1977); 43 Fed. Reg. 18258 (1979); 44 Fed. Reg. 30437 (1979).

[208] Saccharin was the other available artificial sweetener. *See* 42 Fed. Reg. 19996 (1977).

[209] Plotkin, *The Cyclamate Ban: Science, Politics, and Law* (April 1978) (unpublished M.A. thesis).

The panel eventually consisted of scientists form the Institute and academic consultants. The group met privately over more than a year, reviewed all of the data, and in 1976 submitted to FDA a lengthy and, in the Commissioner's view, inconclusive report. There had been no dialogue between the NCI panel and the Commissioner's office prior to receipt of the report. The panel in substance concluded that none of the tests demonstrated that cyclamate was a carcinogen, but it went on—in typically cautious language—to describe both the important limitations of those studies and the other evidence suggesting that cyclamate might pose a chronic health hazard.[211]

Faced with this guarded judgment, Commissioner Schmidt felt disabled with finding that cyclamate would not cause harm to consumers if permitted back in food.[212] Emphasizing that the burden of proving safety lay with the petitioner, Abbott Laboratories, the agency denied its petition, precipitating a formal administrative hearing and several court challenges.[213] The hearing eventually led to a ruling by Schmidt's successor as Commissioner that Abbott had failed to carry its burden of proof.[214]

During the formal administrative process neither party took issue with the formation or procedures of the NCI panel. There was, in short, little disagreement about the integrity of the process by which the panel's judgment was sought. But there was intense dispute over what the panel's judgment should mean for FDA. Abbott vigorously challenged its interpretation of specific studies, while counsel for FDA's Bureau of Foods went well beyond the panel's report in attempting to raise serious doubts about cyclamate's safety.

The cyclamate episode suggests that neither the composition nor the procedures of the panel influenced the acceptance of its conclusions. Nor is it likely that clarification of the panel's charge would have averted the disagreements between FDA and the petitioner. The panel members were careful to confine their conclusions to the scientific questions about which they felt competent. Subsequent dispute stemmed from conflicting views about FDA's legal responsibility, which led to what was in substance a de novo reexamination of the underlying scientific issues. Without expressing any view about the correct resolution of these issues, it is difficult to visualize a procedure that would have produced findings immune to relitigation—absent Abbott's agreement in advance to abide by the outcome of a particular process. The firm otherwise could be expected to contest any conclusions that failed to yield reapproval of cyclamate. Abbott spokespersons would also contend that no peer review procedure can be expected to produce unbiased results, so long as FDA retains ultimate decisional authority.

---

[210] Abbott Laboratories' contention and its food additive petition figure prominently in Abbott Laboratories v. Harris, 481 F. Supp. 74 (N.D. Ill. 1979).

[211] The Report of the Temporary Committee for the Review of Data on Carcinogenicity of Cyclamate, National Cancer Institute, February 1976, is summarized at 45 Fed. Reg. 61483 (1980).

[212] 41 Fed. Reg. 43754 (1976). § 348 (1976). *See generally* Merrill, *Regulating Carcinogens in Food: A Legislator's Guide to the Food Safety Provisions of the Federal Food, Drug, and Cosmetic Act*, 77 Mich. L. Rev. 171 (1979).

[213] Petition denied, 41 Fed. Reg. 43754 (1976); Hearing granted, 42 Fed. Reg. 12515 (1976); Issue Remanded to Administrative Law Judge, 44 Fed. Reg. 47620 (1979).

[214] 45 Fed. Reg. 61473-530 (1980).

Red No. 40. Red No. 40 is the one remaining red color approved for food use in the United States. It was first "listed," i.e., approved, by FDA in 1970 on the basis of laboratory experiments whose results were sufficiently ambiguous to persuade the Canadian government to decline to permit its use.[215] A residual concern was the possibility that the color might be carcinogenic. In 1975 several events conspired to make this possibility a volatile issue for FDA.

The first event was FDA's decision to suspend its provisional approval for Red No. 2, the red color with the longest history of use and widest commercial appeal.[216] This decision, ironically, was precipitated by a chronic study in FDA's own laboratories which, though flawed in execution, indicated that Red No. 2 might be carcinogenic.[217] The second event was the receipt of preliminary findings from an on-going chronic study of Red No. 40, which suggested to some reviewers that this color might cause cancer in the test animals. The apparent similarity between the two findings made it awkward for FDA to defend its action against Red No. 2 and simultaneously resist demands that it ban Red No. 40. As a legal matter, however, the latter's approved status made its removal more difficult and FDA scientists cautioned that the Red No. 40 findings were only preliminary. Furthermore, precipitious action by FDA would have been disruptive because the loss of Red No. 2 had prompted most food producers to substitute Red No. 40.

Faced with scientific controversy, FDA created a special "working group" of scientists to evaluate the results of the Red No. 40 study as it progressed.[218] This panel—FDA retained the name "working group" perhaps to defuse claims that it was an advisory committee—consisted of scientists from FDA's Bureau of Foods, from the Commissioner's own staff, and from parts of the Public Health Service.[219] The group's responsibility was to monitor the progress of ongoing studies of Red No. 40 and report their findings to the Commissioner. It periodically met in public session and permitted statements by scientists from industry and from the Center for Science in the Public Interest (CSPI), an early proponent of banning the color. FDA also released the working group's reports for public review,[220] but it made no formal attempt to assure compliance with the FACA.

---

[215] Red No. 40 is "listed" for use in foods under 21 C.F.R. § 74.340, in drugs under 21 C.F.R. § 74.1340, and in cosmetics under 21 C.F.R. § 74.2340.

[216] *See* Certified Color Mfrs. Ass'n v. Mathews, 543 F.2d 284 (D.C. Cir. 1976).

[217] *Id.*

[218] 41 Fed. Reg. 53546 (1976).

[219] *Id.* The working group was chaired by Dr. Albert C. Kolbye, Jr., Associate Director for Science in the Bureau of Foods, FDA, and originally consisted of the following members: Dr. Richard Bates, Associate Commissioner for Science, FDA; Dr. Cipriano Cueto, National Cancer Institute (NCI); Dr. Morris Cranmer, Director, National Center for Toxicological Research (NCTR); Dr. Robert Squire, NCI; Dr. Gary Flamm, NCI; Dr. Charles Frith, NCTR; and Dr. George Wolff, NCTR. Members Squire and Frith Later left the Group and were replaced by Dr. Jerrold Ward, NCI, and Dr. Morris Weinberger, FDA. In addition, Dr. Kenneth C. Chu, NCI, Dr. John Gart, NCI, Dr. David Gaylor, NCTR, and Mr. James Winbush, FDA, all were given permanent positions on the Working Group. 42 Fed. Reg. 61630, 61631 (1977).

In late 1981, FDA Commissioner Hayes released the working group's final report, which concludes that Red No. 40 is not carcinogenic in rats or mice.[221] The agency accordingly has initiated no regulatory action against the color. It now appears unlikely that CSPI will attempt to challenge the group's findings, beyond expressing its disagreement and its continued opposition to consumer exposure to "untested" food colors. FDA would reject any petition to ban the color. CSPI would then have the burden of demonstrating that FDA's failure to act was an abuse of discretion[222]—in the face of a report by expert scientists who have been reviewing the accumulating data over nearly six years.

In addition to time, the creation of the Red No. 40 working group afforded FDA not merely the appearance but reality of an independent assessment of the color's toxicity. By creating a body to deal specifically with Red No. 40, the agency helped to expose its processes for decisionmaking. By combining staff members with outside experts, the agency enhanced both its own credibility and the standing of its own scientists. Furthermore, the working group's status demonstrates the sort of attention to the issue that will make FDA's conclusions more resiliant to attack than if it rested exclusively on evaluations prepared by its own staff.

Nitrite. Sodium nitrite is added to meat and poultry to prevent spoilage, retard the growth of botulinum bacteria, and—most importantly—give meat a distinctive and appetizing appearance. Because of evidence that nitrosamines, a breakdown product of nitrite, causes cancer in laboratory animals, both FDA and USDA have long been concerned about nitrite's safety.[223] In June 1974, FDA commissioned Dr. Paul Newberne of MIT to conduct a study to determine whether nitrite itself is carcinogenic. Four years later Dr. Newberne submitted his finding that nitrite appeared to cause cancer in rodents.

When this finding was reported to FDA in 1978, the agency had no formal written procedure for evaluating data generated by contract studies, but its practice was well established.[224] Bureau of Foods scientists would usually conduct in-house evaluations to assess the strengths and weaknesses of the data and explore regulatory alternatives.[225] The Bureau's Division of Toxicology generally would commence the review and, if cancer were suspected, forward the study to the Bureau's Cancer Review Committee. That committee could recommend establishment of an interagency working group, similar to that created for Red No. 40, if the compound studied posed difficult scientific or regulatory issues. This internal review process did not ordinarily include reexamination of tissue slides to confirm reported pathological findings.[226]

---

[220] *See, e.g.* 42 Fed. Reg. 8005 (1977); 44 Fed. Reg. 30437 (1979).

[221] 46 Fed. Reg. 51037 (1981).

[222] Section 706(2) (A) of the Administrative Procedure Act, 5 U.S.C. § 706(a)(A), provides that a reviewing court shall set aside agency action, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

[223] *See* General Accounting Office, *Does Nitrite Cause Cancer? Concerns About Validity of FDA-Sponsored Study Delay Answer* (1980) at 9–12 [hereafter GAO Nitrite Report].

[224] *Id.* at 12.

In the case of the nitrite study, FDA omitted routine review by the Bureau of Foods; instead, Commissioner Kennedy set up a special task force of selected agency personnel to evaluate Newberne's results.[227] According to FDA officials this departure from routine was a response to the special problems posed by nitrite: It is added to seven per cent of U.S. food, which represents 12 billion dollars per year in sales, and its use prevents fatal poisonings. Newberne's reported findings were thus thought to demand immediate attention in a setting that permitted simultaneous, top-level evaluation of regulatory options. The Commissioner's special task force was accordingly directed to consider the scientific, legal, and regulatory dimensions of the nitrite problem. After the task force's one toxicologist confirmed Newberne's reported findings, the members devised a plan for a gradual phase out of nitrite, which was to be disclosed at the same time the MIT data were released publicly.[228]

Before FDA and USDA announced Newberne's results, Bureau of Foods scientists raised several potential problems with the study.[229] These problems were sufficiently serious that the Bureau's Acting Director recommended to Commissioner Kennedy that a special working group of scientists should be formed to evaluate the Newberne study's validity. Accordingly, on August 8, 1978, the agency created the Interagency Working Group on Nitrite (IAWG). This group included scientists from FDA, USDA, NIC, and the NIEHS, who were to evaluate the accuracy of Newberne's pathological diagnoses.

After two IAWG pathologists reexamined a sample of Newberne's slides and failed to confirm his diagnoses, the working group recommended thorough independent reexamination of the study records. Based on this recommendation, FDA contracted with Universities Associated for Research and Education in Pathology, Inc. (UAREP), a non-profit consortium of pathologists from 15 universities, to review Newberne's pathology. The working group later reported that both it and UAREP had concluded that the evidence did not support Newberne's findings that nitrite caused cancer in rodents. Red-faced, FDA and USDA simultaneously announced that no action to end the use of nitrite in food would be initiated.[230]

---

[225] *Id.* at 9–16.

[226] FDA will undertake to verify pathology results when they seem internally inconsistent, when the pathology descriptions are ambiguous or do not agree with the conclusions of the study, or when the results do not coincide with available data.

[227] The task force included the Commissioner, the Deputy Commissioner, the Chief Counsel, the Special Assistant to the Commissioner, the Executive Assistant to the Commissioner, the Acting Director, Bureau of Foods, the Project Officer for the MIT nitrite contract and a toxicologist from the Division of Toxicology, Bureau of Foods.

[228] GAO Nitrite Report at 14–21.

[229] *Id.* at 21–22.

The nitrite episode demonstrates both the importance and the difficulty of peer review of laboratory findings. FDA's missteps stemmed from tension between its role as public advisor, which could have been undermined by the release of the Newberne findings before it had devised a response, and its responsibility to rely on sound science. The agency had only recently weathered the public furor over saccharin. It therefore is understandable why, when they received Newberne's findings, agency officials wanted to find alternatives to a complete ban. But its preoccupation with the regulatory implications of Newberne's study led the Commissioner's task force to subordinate its scientific role. Only after the task force recommended a phase out of nitrite did FDA begin to explore the questions about the study's validity, questions raised initially by staff scientists who had been excluded from the special review procedure set up for the occasion. The agency's subsequent embarrassment indicates the importance of scientific peer review, but the episode illustrates the capability of FDA's own scientists.

b. *Consumer Product Safety Commission*. Of the four agencies studied, the CPSC has had least experience with advisory panel review of chemical hazards. It is perhaps ironic, therefore, that the Commission is now obligated by statute to consult with an independent scientific review panel before attempting to regulate products believed to present a risk of cancer. This obligation is the product of congressional amendments to the CPS Act (and other statutes administered by the Commission) enacted in 1981.[231]

The CPSC's past failure to consult with independent scientists has not betokened indifference or special confidence in its own scientific staff. With the exception of TRIS, all of the substances that the agency attempted to regulate during the 1970's had previously been characterized as carcinogens by other scientific bodies or sister regulatory agencies.[232] Thus its findings that vinyl chloride, asbestos, benzene, and chloroflurocarbon propellants posed a potential risk of cancer were never seriously challenged.[233] It is not surprising, therefore, that the Commission saw no need for independent peer review. The agency's conclusions that products containing these ingredients posed a significant risk, however, often did provoke disagreement because of uncertainty about the intensity, duration, and route of human exposure. The agency never sought independent review of its exposure assessments before initiating regulation.[234]

---

[230] Chemical Regulation Reporter (BNA), 663–64 (1980).

[231] Consumer Product Safety Amendments of 1981, Pub. L. No. 97-35, § 1206, 95 Stat. 357 (1981) (amending 15 U.S.C. § 2077 (1976)).

[232] Merrill, *CPSC Regulation of Cancer Risks in Consumer Products: 1972–1981*, 67 Va. L. Rev. 1261, 1310 (1981) [hereafter Merrill: Consumer Products].

[233] *Id.* at 1310.

[234] Uncertainty about exposure was troublesome in the case of urea formaldehyde foam and hair dryers containing asbestos. *Id.* at 1346–51, 1354–60.

Formaldehyde. In 1980, the CPSC for the first time formally sought the advice of outside scientists in evaluating a chemical's risks. When the agency contemplated regulating urea formaldehyde foam insulation (UF insulation) it confronted a chemical whose carcinogenicity had not been confirmed by scientific review or established in regulatory actions by other agencies.

UF foam is a cellular plastic product with a shaving cream-like consistency which is pumped into the walls of homes through small holes to provide thermal insulation. In 1976 the CPSC learned about residents of homes insulated with UF foam who had begun to complain of respiratory distress, persistent cough, nausea, dizziness, and other irritations, which some scientists attributed to escaping formaldehyde gas.[235] The CPSC proposed a warning requirement for UF insulated homes, based on these acute effects.[236] When the Chemical Industry Institute for Toxicology (CIIT)[237] in late 1970 reported preliminary results of an inhalation study which showed formaldehyde to be a carcinogen in rodents, the agency concluded that it should consider more drastic action.

Accordingly, on February 12, 1980 the Commission announced the formation of a panel composed of scientific experts from other regulatory and research agencies to review the data on formaldehyde (including specifically the CIIT study) and assess the cancer risk of formaldehyde gas leaking from UF insulation.[238] The review panel was established by the National Toxicology Program at the request of the CPSC and the other IRLG agencies. The CPSC offered no detailed explanation for its decision to have a panel of outside experts assess the risks of UF foam insulation, but its reasoning is easily deduced. The Commissioners were surely cognizant of the limitations of the agency's own small scientific staff. More important, the CPSC had frequently made clear its desire to maintain a common front with the other IRLG agencies, which had placed formaldehyde on collective priority list for joint evaluation and regulation.[239] The interagency panel's findings were expected to guide subsequent decisions of the other three agencies as well as the CPSC.[240]

The review panel consisted exclusively of government scientists, most from research agencies such as NIEHS, NCTR, and NCI.[241] FDA, EPA, and OSHA also supplied members, and the secretary was Dr. Peter Preuss, CPSC's Associate Executive Director for Health Sciences. The panel met in closed session on several occasions to review the CIIT findings and other data on formaldehyde toxicity. The panel also consulted with the CIIT scientists responsible for the inhalation study and accepted oral as well as written submissions from the Formaldehyude Institute, an association of users and manufacturers. The panel submitted a written report to the CPSC in late November 1980, somewhat later than expected.[242] Based on evaluation of the CIIT study results and other data, the panel members were convinced that formaldehyde was an animal carcinogen and should be considered a potential human carcinogen. The panel did not attempt to estimate the risk posed by exposure to formaldehyde fumes in UF foam insulated homes. The Commission's staff later performed such a risk assessment, using the panel's recommended extrapolation procedure and its own estimates of consumer exposure conditions.[243]

---

[235] *See id*; Troxel, *Interagency Coordination of Toxic Substance Regulation: The Formaldehyde Controversy*, unpublished essay, University of Virginia School of Law (Dec. 21, 1981). *see also* 45 Fed. Reg. 34031, 39434, 39438 (1980); 46 Fed. Reg. 11188, 11190 (1981).

[236] *See* 45 Fed. Reg. 39434 (1980).

[237] The CIIT is a scientific organization supported by thirty-six American chemical corporations and located in Research Triangle Park, North Carolina. It tests chemicals to determine their health effects and seeks to develop and improve test protocols. The CIIT enjoys a reputation for high-quality scientific work.

[238] *See* 46 Fed. Reg. 11190 (1981).

[239] Merrill Consumer Products at 1262, 1267.

[240] Interview with Dr. Peter Preuss, note 163, *supra*.

[241] 46 Fed. Reg. 11190 (1981).

It is premature to assess the impact or utility of the CPSC's initial experiment with independent peer review. Based on the panel's assessment, the agency later proposed a ban on future installation of UF foam insulation.[244] This proposal drew sharp opposition and sharp criticism from the industry of both the panel's and the agency's characterization of the risks of formaldehyde.[245] After once postponing a decision on its proposal,[246] the Commission in late February, 1982, voted to ban further installation of UF foam insulation.[247] The announced rationale for this action departs somewhat from the agency's proposal, which stressed the cancer risk of escaping formaldehyde gas; the final ban is justified primarily in terms of the acute health effects of formaldehyde gas, which were the basis of the agency's original proposal to require a warning on UF insulated homes.[248]

The CPSC's reemphasis of the acute hazards of formaldehyde position does not necessarily betray second thoughts about its carcinogenicity, for which the animal evidence now seems unequivocal,[249] or about the advice of the expert review panel. Yet the Commission or its agency staff clearly have become reluctant to make the risk of cancer the central ground for a ban of UF foam insulation. Undoubtedly contributing to this uncertainty was EPA's near-contemporaneous, and widely predicted, announcement that, given prevailing exposure levels, the evidence of formaldehyde's carcinogenicity did not justify regulation under section 4(f) of the Toxic Substances Control Act.[250] Previously, OSHA had declined to issue an emergency temporary standard for worker exposures to formaldehyde, though it reportedly contemplates rapid action to establish a permanent health standard to reduce worker exposure.[251]

---

[242] The report was delivered on November 21, 1980. 46 Fed. Reg. 11188, 11190 (1980).

[243] *Id.* at 11188, 11190–92, 11195.

[244] 46 Fed. Reg. 11188 (1981).

[245] [1981] Chemical Regulation Reporter 1209 (BNA).

[246] 46 Fed. Reg. 49140 (1981).

[247] [1982] Chemical Regulation Reporter ________(BNA).

[248] *Id.* at 33.

[249] Interview with Dr. Norton Nelson, New York University, March 18, 1982.

[250] TSCA § 4(f), 15 U.S.C. § 2603 (4)(f).

1981 Amendments to CPS Act. It may not be possible to assess the impact of advisory panel review on the CPSC's regulation of chronic hazards, but such review will hereafter be an integral part of the agency's decisionmaking. Early in 1981, the Reagan Administration invited Congress to consider abolishing the CPSC and transferring its functions to the Department of Commerce.[252] While Congress declined to disband the agency, it reauthorized it for only two years and reduced its budget by 30 percent.[253] The reauthorizing legislation also made important changes in the CPSC's authority and procedures. Among the changes in the CPS Act is a new section 31, which directs the agency to seek expert advice whenever it contemplates regulation of a substance believed to pose a risk of cancer.[254]

---

[251] [1981] Chemical Regulation Reporter 1170 (BNA).

[252] Merrill, Consumer Products at 1373–75.

[253] *Id.* at 1373, n.583.

[254] Amended CPS Act § 31, 15 U.S.C. § 2080, reads in pertinent part as follows:

> (b)(1) The Commission may not issue an advance notice of proposed rulemaking for—
>
> (A) a consumer product safety rule,
>
> (B) a rule under section 27(e), or
>
> (C) a regulation under section 2 (q)(1) of the Federal Hazardous Substances Act, relating to a risk of cancer, birth defects, or gene mutations from a consumer product unless a Chronic Hazard Advisory Panel, established under section 28, has, in accordance with paragraph (2), submitted a report to the Commission with respect to whether a substance contained in such product is a carcinogen, mutagen, or teratogen.
>
> (2)(A) Before the Commission issues an advance notice of proposed rulemaking for—
>
> (i) a consumer product safety rule
>
> (ii) a rule under section 27(e), or
>
> (iii) a regulation under section 2(q)(1) of the Federal Hazardous Substances Act, relating to a risk of cancer, birth defects, or gene mutations from a consumer product, the Commission shall request the Panel to review the scientific data and other relevant information relating to such risk to determine if any substance in the product is a carcinogen, mutagen, or a teratogen and to report its determination to the Commission.
>
> (B) When the Commission appoints a Panel, the Panel shall convene within 30 days after the date the final appointment is made to the Panel. The Panel shall report its determination to the Commission not later than 120 days after the date the Panel is convened or, if the Panel requests additional time, within a time period specified by the Commission. If the determination reported to the Commission states that a substance in a product is a carcinogen, mutagen, or a teratogen, the Panel shall include in its report an estimate, if such an estimate is feasible, of the probable harm to human health that will result from exposure to the substance.
>
> (C) A Panel appointed under section 28 shall terminate when it has submitted its report unless the commission extends the existence of the Panel.
>
> (D) The Federal Advisory Committee Act shall not apply with respect to any Panel established under this section.
>
> (c) Each Panel's report shall contain a complete statement of the basis for the Panel's determination. The Commission shall consider the report of the Panel and incorporate such report into the advance notice of proposed rulemaking and final rule.

Specifically, new section 31 provides that the CPSC may not issue an advanced notice of proposed rulemaking[255] "relating to a risk of cancer," unless it has first recieved a report from a "chronic hazard advisory panel."[256] Such a panel is a group of seven scientific experts appointed by the Commission, from nominees submitted by the National Academy of Sciences, to review the scientific data and "determine if [a] substance . . . is a carcinogen." If feasible, the panel shall also provide an estimate "of the probable harm to human health that will result from exposure to the substance."[257] A panel does not become a permanent part of the Commission's structure but is created to evaluate a specific hazard. Panel members must have "demonstrated the ability critically to assess chronic hazards to risks to human health" from toxic substances; none may be employees of the federal government.[258]

The amended CPS Act does not describe the procedures by which chronic hazard advisory panels shall perform their function. The statute does state that a panel may request information from the states, industry, and other private sources, as well as from the Commission, but it may obtain or release information only through the agency.[259] A panel must submit a written report, containing "a complete statement of the basis for [its] . . . determination,"[260] which shall be incorporated into any ANPR that the agency decides to issue but is not to bind the agency. The statute also provides that "the Federal Advisory Committee Act shall not apply with respect to any Panel established under this section,"[261] thus apparently freeing panels from the obligations to provide advance notice of meetings and to open their deliberations to the public.[262]

The scant legislative history of the 1981 CPSC amendments reveals little about Congress' understanding of these requirements for peer review, but their enactment indicates skepticism of the CPSC's ability to assess chronic hazards.[263] The authors of the provision may or may not have considered the formaldehyde panel a worthwhile experiment, but the exclusion of federal scientists reveals a desire to remove the peer review function from government altogether. It has been suggested that section 31 represents the first attempt to incorporate into federal law the "national science council" concept advocated by Congressman William Wampler.[264]

c. *Occupational Safety and Health Administration.* The OSH Act contemplates two types of advisory committees to assist OSHA.[265] The Act itself establishes a standing body, the National Advisory Committee on Occupational Safety and Health (NACOSH),[266] and it also empowers OSHA to create special expert committees to provide advice on specific standards.[267] Both NACOSH and ad hoc committees have been involved in OSHA's efforts to set workplace health standards, but their role has always been a secondary one and over time has declined in importance.

---

[255] *Id.*

[256] *Id.*

[257] *Id.*

[258] CPS Act § 28(b)(2), 15 U.S.C. § 2077 (b)(2) (as amended 1981).

[259] *Id.* at § 28(g), (h)(1), 15 U.S.C. § 2077(g), (h)(1) (as amended 1981).

[260] CPS Act § 31(b)(2)(B), (C), 15 U.S.C. § 2080(b)(2)(B), (C) (as amended 1981).

[261] *Id.* at § 31(b)(2)(D), 15 U.S.C. § 2080(b)(2)(D) (as amended 1981).

[262] *See* notes 173–91 *supra* and accompanying text.

[263] House Conf. Rep. No. 97-208, 97th Cong., 1st Sess. 881–83 (1981).

[264] *See* Risk Assessment in the Federal Government, p. 135–139.

[265] OSHA Draft at 14.

NACOSH has approximately twenty members who are drawn from the industrial health community, from industry, and from employee organizations.[268] These members are not expected to be expert in evaluating specific hazards but rather are viewed as representative of the communities primarily interested in occupational health and safety. NACOSH meets on a regular schedule to provide advice on broad policy issues, *e.g.*, OSHA enforcement practices or the allocation of agency resources.[269] While the Committee generally encouraged OSHA's mid-1970's shift of focus from safety to health hazards, it has played no significant role in the development of specific OSHA standards or of OSHA's generic carcinogen policy. NACOSH's broader influence, moreover, has always depended on the receptivity of the incumbent OSHA administrator. Before Dr. Eula Bingham became Assistant Secretary, she viewed the advisory committee process as an important means of exposing the agency to new ideas and good science. Afterwards, she came to regard committees as a cause of delay and a hindrance to effective decisionmaking. She attended only the first and last meetings of NACOSH during her tenure.[270]

OSHA has also exercised its authority to appoint special advisory committees in developing specific workplace standards. Membership on such ad hoc committees is limited to fifteen or fewer members, at least one of whom must be appointed by the Secretary of HHS.[271] The membership of these committees, too, must be balanced to assure representation of the views of employers, workers, and state public health and safety agencies.[272] Labor organizations, and to a lesser extent employers as well, have viewed these ad hoc committees as vehicles for making their views known to the agency, and have pressed to be represented among the membership.[273]

The partisan outlook of many members of these ostensibly specialized ad hoc committees has not always been disabling, perhaps because the committees have typically been consulted on the full range of policy issues OSHA confronts in setting health standards, not merely, or even primarily, health effects questions. For example, in 1973 the steel industry petitioned OSHA to raise the then-existing exposure limits for coke oven emissions.[274] OSHA Administrator Morton Corn established a special advisory committee with Eula Bingham, then still an academic, as chair. After reviewing available data, the committee recommended stricter exposure limits than those prevailing. Industry members had provided most of the data supporting the feasibility of the recommended standards, and some privately agreed with the majority recommendation.[275] Nonetheless, concern for their constituents prevented them from supporting OSHA's eventual proposal to amend the coke oven standard. The reluctance of many members of ad hoc committees to express views unpopular with the groups they represent has led many OSHA officials to question Congress' original conception.[276]

---

[266] *Id.*

[267] *Id.*

[268] 29 U.S.C. § 656(b). Interview with Charles Gordon, note 164 *supra*.

[269] Interview with Charles Gordon, note 164 *supra*; Interview with Grover Wrenn, former Director of Health Standards, OSHA, June 23, 1981.

[270] Interview with Grover Wrenn, note 269 *supra*.

[271] 29 U.S.C. § 656(b).

[272] *Id.*

[273] Interview with Grover Wrenn, note 269 *supra*.

In its early years, OSHA routinely appointed an advisory committee for each health hazard it contemplated regulating,[277] but eventually abandoned the practice. The committee established to review the coke oven standard was the last such body that OSHA has consulted in setting a health standard. Dr. Eula Bingham, who became Assistant Secretary in 1977, felt competent to assess most scientific data personally; and agency staff found that committee consultation delayed the standard-setting process without contributing useful advice or insights.[278] Perhaps equally important, the agency found it possible to engage expert scientists as consultants without going through the process of establishing formal committees. Few observers of OSHA's performance during the last decade have applauded the contribution of ad hoc advisory committees or criticized the agency's failure to create new ones. No committee's endorsement ever diminished criticism of OSHA's scientific analysis; every recent OSHA health standard has been vigorously contested at the administrative level, and all but two have been challenged in court.[279]

OSHA's dissatisfaction with advisory committees does not, however, demonstrate that scientific peer review cannot be successful in this context. The American Industrial Health Council's proposal for a ''science council,'' discussed in more detail in the next Section,[280] was inspired primarily by experience with OSHA's health standards process. Furthermore, as noted, the agency's own neglect of the advisory committee mechanism did not display a desire to dispense with outside scientific advice; the agency often obtained such help by appointing consultants. It is at least plausible, therefore, that a mechanism for assuring independent consultation on scientific issues would improve OSHA's decisions if it did not also have to fulfill the political objective of assuring representation to both employer and worker interests.

---

[274] *See* 38 Fed. Reg. 26207 (1973).

[275] Interview with Grover Wrenn, note 269 *supra*.

[276] *Id.* ¶ 260. See Nichols and Zeckhauser, *OSHA Comes to the Workplace*, 54 Pub. Int. 39 (1979).

[277] Interview with Charles Gordon, note 164 *supra*.

[278] Interview with Grover Wrenn, note 269 *supra*.

[279] *See* OSHA Draft at 39.

[280] *See* text accompanying notes 341–59 *infra*.

d. *Environmental Protection Agency.* EPA's experience with expert advisory panels is distinctive. It is the only agency among the four studied whose risk assessments—in this case for individual pesticides—have for some time been subject to mandatory peer review. The mechanism for this review is the Scientific Advisory Panel (SAP), a standing committee mandated by statute.

SAP was established by Congress in 1975 to strengthen EPA's scientific analysis.[281] From the outset the panel's principal responsibility has been to provide impartial oversight of EPA's own evaluation of the environmental and health risks posed by particular pesticide uses. SAP's creation reflected sentiment in Congress that previous EPA actions against pesticides had lacked an independent scientific base.[282] The legislative history of the 1975 amendments to FIFRA reveals a desire to introduce disinterested scientific review into EPA's regular decisionmaking process:

> The creation of a Scientific Advisory Panel and notification of this panel of proposed cancellation or suspension actions of any proposed regulations are intended to further assure balance and objectivity in EPA actions. The purpose of this provision is to assure that the EPA obtains unbiased objective scientific opinion in making its decisions.[283]

SAP's responsibilities have been enlarged by Congress on two subsequent occasions. As amended in 1975, FIFRA required only that SAP be consulted when the agency contemplated cancellation of a pesticide's registration.[284] In 1978 Congress also required that the EPA Administrator solicit SAP's recommendations for operating guidelines to improve the quality of scientific analyses performed by agency personnel to support agency decisions.[285] Two years later, Congress again enlarged SAP's responsibilities. First, it obligated EPA to afford the panel an opportunity to evaluate all suspension actions "as to the impact on health and the environment."[286] Second, SAP—or other nonagency scientists selected from a list it assembled—was directed to review the "design, protocols, and conduct of major scientific studies" relied upon by the agency in changes of classification, suspension, or cancellation proceedings.[287] The panel also was given power to appoint additional subpanels of outside experts to assess the studies relied upon in agency proposals. These most recent changes were a product of Congressional dissatisfaction with EPA's suspension of certain uses of the herbicide 2,4,5-T.[288] They were also a response to a General Accounting Office study which criticized EPA for failure to develop a formalized system of peer review.[289]

---

[281] Pub. L. No. 94-140, § 7, 89 Stat. 753–54 (1975), codified at 7 U.S.C. §§ 136d, 136w (1976). EPA Administrator Train opposed SAP as "unnecessary." S. Rep. No. 94-452, 94th Cong., 1st Sess. 19, *reprinted in* [1975] U.S. Code Cong. & Ad. News 1375 (statement of Russell E. Train).

[282] *See, e.g.*, S. Rep. No. 94-452, 94th Cong., 1st Sess. 9, *reprinted in* [1975] U.S. Code Cong. & Ad. News 1366; H. Conf. Rep. No. 94-668, 94th Cong., 1st Sess. 5, *reprinted in* [1975] U.S. Code Cong. & Ad. News 1380.

[283] S. Rep. No. 94-452, 94th Cong., 1st Sess. 9, *reprinted in* [1975] U.S. Code Cong. & Ad. News 1366.

[284] Pub. L. No. 95-396, § 23, 92 Stat. 836 (1978), codified at 7 U.S.C. 136w (Supp. III 1979).

[285] Pub. L. No. 96-539, §§ 1, 2(a), 94 Stat. 3194, 3195 (1980), codified at 7 U.S.C. § 136w (Supp. IV 1980).

[286] *Id.*

[287] H.R. Rep. No. 96-1020, 96th Cong., 2d Sess. 4, 18, *reprinted in* [1980] U.S. Code Cong. & Ad. News 6723, 6733.

SAP's role and structure. Throughout its brief history, SAP has thus been conceived of as a mechanism for overseeing the scientific foundations of EPA's pesticide decisions. By law the panel must be afforded an opportunity to evaluate notices of intent to cancel or reclassify pesticide uses,[290] contemplated suspensions of registration, and proposed and final general pesticide regulations. Such agency decisions are to be submitted to SAP "for comment as to the impact on health and the environment of the action proposed."[291] In no instance, however, are the panel's recommendations binding on EPA.

SAP consists of seven members selected by the EPA Administrator from among six nominees by NIH and six nominees submitted by the National Science Foundation.[292] As of July, 1981, SAP had only six members, whose fields included plant pathology, epidemiology, zoology-wildlife, pharmacology, entomology, biochemistry, and pathology.[293] For several months the panel had no member with substantial background in toxicology, a critical speciality in assessing the health risks posed by pesticides. According to some observers, lack of such expertise has been a persistent problem during much of SAP's existence.[294]

From its creation SAP has generally met once a month.[295] The panel's meetings are routinely open to the public, and interested parties are generally encouraged to make presentations.[296] Indeed, SAP has sometimes allowed sessions to become adversarial debates on issues that can range well beyond the health and environmental risk assessments contained in the documents submitted for its formal review.[297] The panel may request Office of Pesticide Programs representatives to attend such meetings to defend agency determinations and in the same session permit industry representatives and other interested persons to respond. In the process individual panel members may actively question participants.

---

[288] *Id.* at 4, [1980] U.S. Code Cong. & Ad. News 6723.

[289] *Id.*

[290] FIFRA § 25(d), 7 U.S.C. § 136w (Supp. IV 1980).

[291] *Id.*

[292] *Id.*

[293] Membership List, Scientific Advisory Panel, EPA, as of July 13, 1981.

[294] Interview with Philip Gray, Executive Secretary, Scientific Advisory Panel, EPA (July 14, 1981).

[295] *Id.*

[296] *Id.*

[297] Interview with Steven Jellinek, former Assistant Administrator for Pesticides and Toxic Substances, EPA (June 23, 1981).

There has been concern about SAP's willingness to permit rigorous debate among public participants.[298] Some EPA officials have feared, for example, that pesticide manufacturers might be able to mount flashy, well-financed presentations before SAP that would undermine crucial agency positions after the expenditure of considerable agency resources. In 1980 Congressman Fithian expressed concern that the public character of SAP meetings—required by the FACA rather than EPA policy—had made the panel's proceedings more adversarial and less advisory than originally contemplated:

> If we have had some other accretions along the way so that it has gotten sort of like an administrative law judge proceedings where you bring in both sides and you argue the case, then I would submit that it is a perversion of the intent of the Scientific Advisory Panel which was never intended to do that.
>
> It was purely and intentionally to go to the best scientists we could command and say—for we are not scientists on this committee—"Are we using the best scientific data in making this decision on the protection of the environment and yet allowing the widest possible use of safe chemicals?" That was the purpose behind it.[299]

Apprehensions about SAP's vulnerability, however, have not been borne out by experience. The June, 1981 meeting of SAP to consider EPA's proposed actions on wood preservatives is a useful illustration. During the three-day session the American Wood Preservers Institute (AWPI) launched an uncompromising attack on the scientific underpinnings of EPA's decision to restrict the permitted wood uses of pentachlorophenol, inorganic arsenicals, and creosote.[300] The AWPI's apparent objective was to discredit OPP's proposals by refuting all evidence of adverse health effects caused by the suspect compounds. The industry's strategy backfired. SAP endorsed virtually all of EPA's findings and recommendations.[301] Furthermore, its draft summary of the proceedings included this uncharacteristically critical language:

> The Panel wishes to express its appreciation to Special Pesticide Review Division and Hazard Evaluation staff for their informative briefings. . . . On the other hand, the Panel deplores the lack of scientific objectivity of the presentations by industry concerning biological hazards of wood preservatives, and finds the industry's denial of scientific data concerning the mutagenicity and carcinogenicity of the wood preservatives to be disturbing.[302]

---

[298] *Id.*

[299] *Proposed Extension of the Federal Insecticide, Fungicide, and Rodenticide Act: Hearings on H.R. 7018 Before the Subcomm. on Department Investigations, Oversight, and Research of the House Comm. on Agriculture*, 96th Cong., 2d Sess. 185 (1980) (Comments of Congressman Fithian).

[300] Interview with William Dickinson, Deputy Director, Special Pesticide Review Division, Office of Pesticide Programs, EPA (July 13, 1981).

[301] Interview with William Dickinson, *supra* note 300, interview with Philip Gray, *supra* note 294.

[302] Scientific Advisory Panel, EPA, *Review of Preliminary Notice of Determination Concluding the Rebuttable Presumption Against Registration (RPAR) on Wood Preservative Uses of Pentachlorophenol, Inorganic Arsenicals, and Creosote* (May 15, 1981) (draft).

This episode illustrates the distinction between SAP's statutory review function and formal cancellation hearings. Perceptive participants before the panel have generally stressed the dominance of benefits over risks rather than criticizing the competence of agency scientists.[303] Some participants, however, appear simply to be making a record before SAP that might be useful in later proceedings, rather than addressing new evidence to the panel or enlarging them in discussion of the underlying scientific issues.[304]

Record of SAP review. Critics of EPA's early cancellation actions may have expected the SAP would repudiate the agency's scientific assumptions and reject many of its proposals, but this has not occurred. Over the past five years SAP has agreed with the great majority of OPP judgments brought before it. One informed estimate has placed SAP's approval of staff risk assessments at as high as 90 percent,[305] and other agency officials concur that SAP has affirmed major agency decisions "almost without fail."[306]

The paradigm but perhaps unique case of disagreement between the panel and EPA grew out of the agency's handling of 2,4,5-T. After concluding that forest, pasture, and right-of-way applications of the herbicide posed an imminent threat to the public health, EPA in March, 1979 issued an emergency suspension order and a notice of intent to cancel these three uses of 2,4,5-T and its companion product, Silvex.[307] FIFRA did not then require SAP oversight of EPA suspension decisions, but the agency, as it was required to do, later sought the panel's comments on its intention to hold a hearing on the appropriate regulatory disposition of the other uses of 2,4,5-T and Silvex.[308] After three days of public meetings, SAP declined to support the agency's proposed actions. The panel believed that additional data, including further testing for oncogenicity and reproductive toxicity and more complete monitoring for residues, were required before a hearing could be profitably held.[309] Despite SAP's disapproval EPA held firm, announcing the commencement of broad ranging hearings on the risks and benefits of 2,4,5-T, which began in March of 1980.[310] Two major consequences flowed from this series of events: Protracted hearings over 2,4,5-T between EPA and Dow Chemical, and ongoing settlement negotiations, have yet to be concluded. And congressional displeasure with EPA's handling of 2,4,5-T/Silvex crystallized in the 1980 amendment mandating SAP's involvement in future suspension decisions.[311]

---

[303] Interview with Philip Gray, *supra* note 294.

[304] *Id.*

[305] Interview with Steven Jellinek, *supra* note 297.

[306] Interview with Philip Gray, *supra* note 294.

[307] 44 Fed. Reg. 15874 (1979).

[308] Memorandum from Dr. H. Wade Fowler, Jr., Executive Secretary, SAP, to Deputy Assistant Administrator for Pesticide Programs, Review of FIFRA Section 6(b)(2) Action on 2,4,5-T and Silvex (Sept. 27, 1979).

[309] *Id.*

[310] *Id.*

[311] *See* authorities cited note 282 *supra*.

In April 1979 two members of SAP, Vice Chairman Robert A. Neal and John E. Davies, appeared at congressional oversight hearings on EPA's suspension of 2,4,5-T/Silvex and DBCP.[312] Neal expressed concern that the SAP had been bypassed in both instances, and his recommendation that SAP be formally involved in suspension decisions was implemented in 1980. But neither Neal nor Davies agreed with suggestions that there had been friction between EPA and SAP. Neal at one point complimented the agency for "doing a reasonably good job."[313]

EPA's conception of SAP's role was later explained before the same subcommittee by Steven Jellinek, then Assistant Administrator for Pesticides and Toxic Substances:

> In summary, sometimes we do disagree with the SAP and find that a more or less stringent measure than the one they support is most appropriate, considering the benefits as well as the risks of the pesticide uses in question. Such differences are not surprising, however, considering that risk assessment is not an exact science, but rather a process which, while scientifically supported and necessary for regulatory action, is still full of uncertainties. These differences are usually administrative differences rather than scientific differences. We continue to respect and value the SAP's viewpoints and consider the Panel as an important contributor to balanced decisionmaking.[314]

Assessment. It is the consensus of present and former EPA officials that SAP has played a valuable role in the pesticide program.[315] The agency has been able to attract the panel members who are highly regarded within their own specialities and who are willing to serve, with only modest compensation, because they believe that the scientific issues underlying pesticide regulation do in fact influence decisions that have major economic and social impact.[316] More than once SAP has defused criticism of EPA by endorsing an agency recommendation or confirming the agency's evaluation of a particular compound.[317] Because its members are respected, SAP enjoys cautious support from pesticide and chemical manufacturers. One industry spokesman has even remarked that "SAP represents the highest degree of technical expertise and competence in the scientific community, and has functioned as a model of objectivity."[318]

SAP's role has also improved internal EPA decisionmaking. Mandatory review of notices of intent and proposed regulations has encouraged the OPP to prepare more thoroughly.[319] In addition, OPP's Hazard Evaluation Division has consulted more frequently with panel members to arrive at findings that will withstand SAP's normally skeptical analysis. The agency's Exposure Assessment Group was created in part to strengthen presentations to SAP.[320] While the panel's occasional scrutiny of EPA's regulatory choices may technically exceed its statutory mandate, the agency has learned to anticipate this tendency to stray afield. OPP now tries to frame specific questions for the panel to keep its focus on matters properly within its authority.[321] Because SAP cannot be entirely blinkered, however, EPA officials remain convinced that the panel's findings should not be binding on the agency.[322]

---

[312] *Hearings Before the Subcomm. on Department Investigations, Oversight, and Research of the House Comm. on Agriculture*, 96th Cong., 2d Sess. (1979).

[313] *Id.*

[314] *Id.*

[315] Interview with Steven Jellinek, *supra* note 297; interview with Philip Gray, *supra* note 294.

[316] Interview with Steven Jellinek, *supra* note 297.

[317] *Id.*

[318] *Hearings*, *supra* note 299, at 24.

[319] Interviews with members of the Office of General Counsel, EPA (June 23, 1981).

E. *Mechanisms for Centralized Risk Assessment*

The previous section examined the experience of the four agencies with panels of experts assembled to advise on the health risks of specific substances or activities. An accounting of this experience must acknowledge both successes and failures, whether measured by agency satisfaction or public respect for individual agency decisions or for institutions. The performance of EPA's Science Advisory Panel and FDA's continued support for expert advisory panels in several of its programs are convincing evidence that independent scientific review of agency risk assessments can be successful. An effort was made to identify features of advisory panels likely to contribute to agency and public satisfaction but such judgments inevitably have a strong taste of speculation.

This section discusses three proposals for more drastic changes in the institutional arrangements for making regulatory decisions. None of the proposals treated has actually been tried, so any evaluation necessarily is hypothetical. Indeed, none has yet been fully articulated; detailed descriptions of their mechanical operation and working relationship with the current regulatory apparatus are lacking. Nonetheless, The proposals warrant treatment here because they have generated interest as solutions to perceived serious flaws in current agency practice.

1. *Background and Rationale.*

The proposals in question have a common feature: each would reassign responsibility for evaluating chemical hazards from the individual regulatory agencies to a new institution, a central body that would serve all four agencies. They include a proposal by the American Industrial Health Council, an industry group;[323] a 1978 recommendation by the Office of Science and Technology

---

[320] *Id.* A recent study EPA for failing to make greater use of SAP. General Accounting Office, *Delays and Unresolved Issues Plague New Pesticide Protection Programs* (1980).

[321] Interview with Philip Gray, *supra*, note 294.

[322] *Id.*; interview with Steven Jellinek, *supra*, note 297.

[323] American Industrial Health Council, *AIHC Proposal for a Science Panel*, March 26, 1980 [hereafter AIHC Proposal]. The proposal is amplified in a series of concept papers. *See* AIHC, "Toward a National Cancer Policy: A Framework for Sound Science in Federal Decision Making," August 18, 1981; AIHC, "A Proposal to Ensure a Sound Science Base for Governmental Policies and Regulations Relative to Chronic Health Hazards," August 18, 1981; AIHC, "Proposal for a Science Panel," March 26, 1980; AIHC, "AIHC Recommended Framework for Identifying Carcinogens and Regulating Them in Manufacturing Situations," October 11, 1979.

Policy, part of the Executive Office of the President; [324] and a bill twice introduced by Virginia Congressman William Wampler.[325] While these proposals visualize quite different institutional arrangements, they share one objective: determining the health risks of chemicals would no longer be the sole province of regulatory agencies.

At the outset it is useful to outline the rationales that underlie these current expressions of dissatisfaction with traditional regulatory decisionmaking. Six different objectives are discernible in the proposals. Several of them, it will be seen, also support the use of expert advisory panels.

a. *Scientific independence*. Suspicion of the objectivity of agency scientists is a recurrent theme in the proposals. The implicit argument is two-stage: First, decisionmaking about toxic chemicals can be divided into scientific risk assessment and policy design and selection. The choice of regulatory options is governed by statutory criteria and often involves determining the acceptability of risk, and is thus an appropriate function for politically attuned regulators. Risk assessment, however, demands scientific objectivity and should be independent from the regulatory process.[326] Second, agencies cannot be expected to provide this objectivity; their policy objectives may lead them to shade assessments of risk to support regulatory choices dictated by other considerations.[327] The solution, accordingly, is to place the risk assessment function outside the regulatory agencies.

b. *Scientific expertise*. A companion rationale is the argument that risk assessment of potential carcinogens requires the nation's best scientists—who are not likely to be working in regulatory agencies.[328]

c. *Peer review*. Another argument for independent risk assessment invokes the scientific ethic that new findings are not to be accepted until they are subjected to peer review.[329] The small numbers of top-rank scientists working for regulatory agencies, coupled with the disincentives to research and publication in that environment, effectively preclude such review within the agencies themselves. Assessments of risk should be subject to scrutiny by scientists outside the agencies before becoming the basis for regulatory action.

---

[324] Office of Science and Technology Policy, Executive Office of the President, *Identification, Characterization and Control of Potential Human Carcinogens: A Framework for Federal Decision Making*, February 1, 1979 [hereafter OSTP Proposal].

[325] National Science Council Act of 1980, H.R. 638, 97th Cong., 1st Sess., 127 Cong. Rec. 2, 67 (1981). Originally introduced as H.R. 6521, 96th Cong., 2d Sess., 126 Cong. Rec. 22, 901–02 (1980) [hereafter, Wampler bill].

[326] "AIHC advocates that in the development of carcinogen and other federal chronic health control policies scientific determinations should be made separate from regulatory considerations and that such determinations . . . should be made by the best scientists available. . . ." AIHC Proposal p. 1.

[327] In discussing his bill before Congress, Representative Wampler pointed to FDA's threatened ban of saccharin in 1977 and commented that "It is my view, and I believe the evidence is getting stronger and stronger everyday, that our current crop of regulators are just not using good science to determine the hazards of substances in the market and or workplace, and may be even bending science to fit regulatory actions. . . ." 96th Cong., 2d Sess., 126 Cong. Rec. 36, E1097–8 (1980).

[328] "Having a single truly expert panel make these judgments for all federal agencies should provide a significantly greater degree of expertise than the various agencies could themselves assemble." AIHC Book TAB E, p. 7.

d. *Consistency*. A fourth justification is offered for creation of a new institution to assess the risks of chemicals. The premise is that agencies are often concerned about the same chemicals and should, logically, begin from a common scientific base in fashioning regulatory decisions. If each agency applies its own criteria in evaluating chemicals and performs its own assessment of the risks they pose, there is a high risk of inconsistency. Accordingly, a single body should have responsibility for assessing chemical risks for all four agencies.[330]

e. *Uniformity*. Paralleling the consistency rationale is the argument that centralizing risk assessment will foster the development of uniform criteria for evaluating chemical risks. Despite the efforts of the ILRG[331] and the Regulatory Council,[332] the agencies cannot be relied on to produce a uniform set of standards.

f. *Chemical-by-chemical evaluation*. Though not articulated, this rationale is implicit in the AIHC proposal. The argument, in substance, is that generic rules for evaluating chemicals discourage accurate risk assessment. Chemicals should be assessed individually, with attention to their mechanisms of action, metabolic fate, and other characteristics that conflict with necessarily general assumptions about carcinogenesis.[333]

2. *Content of the Proposals.*

It would not be productive here to describe in detail each of the three principal proposals for new risk assessment institutions. Familiarity with each proposal is not essential to evaluate their common premises or to identify potential problems of implementation. Furthermore, the authors of two of the proposals made clear that they were advocating a concept, not designing a set of procedures. Their descriptions leave many details to be filled in and many questions to be answered. Accordingly, this section does not present parallel summaries of the three proposals. It briefly describes their source and basic contours, and then enumerates, in more general fashion, the many questions that would have to be resolved if a new institution were to be established to assess risks for all four regulatory agencies.

---

[329] Representative Wampler commented that "Until a scientific study has been reviewed by other scientists, its conclusions represent the opinions of the authors only. This has always been an unwritten rule in science. Why should a single unvalidated study applied to the regulatory arena be given a new and different connotation? If anything, the political consequences of the work make it even more susceptible to possible erroneous conclusions." Cong. Rec. Nov. 29, 1979, H-11394.

[330] *Cf.* the NTP panel which evaluated formaldehyde at the request of the IRLG agencies. See text accompanying notes 226–230, *supra*.

[331] Report of the Interagency Regulatory Liaison Group Work Group on Risk Assessment, "Scientific Bases for Identification of Potential Carcinogens and Estimation of Risks," 44 Fed. Reg. 39858 (1979).

[332] Regulatory Council, *Regulation of Chemical Carcinogens*, [1979] Chemical Regulation Reporter (BNA) 1081.

[333] *See* M. C. Throdahl, "Separating Science Definition from Legal Decision," Remarks to the Assembly of Life Sciences, National Academy of Sciences, October 12, 1981, p. 5; AIHC Proposal at 1.

a. *OSTP proposal for bifurcated decisionmaking.* In a 1978 paper several OSTP officials recommended the creation of a central risk assessment body to assure consistent identification, characterization, and assessment of potential human carcinogens.[334] The report first distinguished two stages of regulatory decisionmaking: Stage I consists of identification of potential human carcinogens and quantification of the risk associated with exposure to those substances. Stage II consists of evaluation of regulatory options and their consequences. The OSTP report recommended that the Stage I process of scientific investigation and evaluation should be distinguished in time from the process of choosing regulatory options and should be performed for all agencies by one body.

The theme of the OSTP report was the need to separate the scientific and policy components of regulatory decisionmaking. It suggested that such a separation will facilitate well-organized scientific inquiry, objective review of data, and uniform characterization of the risk associated with potential human carcinogens.[335] Furthermore, the report argued, adoption of a unitary decisionmaking framework would enhance public confidence in federal efforts to regulate potentially hazardous substances while also promoting efficiency and improving the quality of decisions.[336]

The OSTP report recommended that Stage I (health effects assessment and risk analysis) should be placed under the auspices of an expanded National Toxicology Program, which should also develop uniform federal guidelines for epidemiological studies, animal tests, and quantitative risk assessment.[337] The report also suggested that all agencies conducting animal tests or using data generated from such tests should adopt uniform testing procedures.[338] It further recommended that the nature of human exposure—sources, prevalence, duration—should be determined as part of Stage I. Assessments of risk should take into account individual susceptibility and be quantified to the extent possible.[339]

The OSTP report was silent on how Stage I would be set in motion, i.e., how a chemical would become a candidate for evaluation. Nor did it state explicitly what weight was to be given to Stage I's conclusions concerning carcinogenicity and risk. The report's implication was that regulators who had been consciously excluded from the risk assessment process, would not be free to reexamine its results.[340] Whether private parties interested in the outcome of regulatory decisions could challenge these results was left unclear.

---

[334] OSTP Proposal.

[335] OSTP Proposal at 1.

[336] *Id.*

[337] *Id.* at 22.

[338] *Id.* at 10. The OSTP Proposal recommended that findings of carcinogenicity should be based on evaluation of all available evidence, in substance a "weight of evidence" approach. *Id.* at 13. *See also*, McGarity, *The Occupational Safety and Health Administration's Generic Carcinogen Policy: Rulemaking Under Scientific and Legal Uncertainty* 28, (unpublished manuscript 1981); Testimony of Elizabeth Anderson, Director, Office of Health and Environmental Assessment, EPA, Before the House Subcommittee on Operations, Research and Foreign Agriculture, June 23, 1981, p. 4.

[339] OSTP Proposal at 16–19.

b. *AIHC and Wampler proposals for a National Science Council*. Unlike the OSTP report, which is more in the nature of a concept paper, two more recent proposals to establish new risk assessment institutions have been described in operational terms. Because these proposals use similar terminology and have several common features, they are summarized together here.

On February 13, 1980 Congressman William Wampler introduced legislation to establish a National Science Council.[341] Mr. Wampler's bill calls for the creation of a scientific panel, entirely independent of the regulatory agencies, to provide authoritative decisions on disputed questions of scientific fact.[342] The American Industrial Health Council had previously developed a similar proposal to create a central science panel to evaluate chemical hazards for all regulatory agencies.[343]

Both proposals stress the importance of uniform, consistent resolution of the scientific questions underlying regulatory decisions. Both emphasize the need to separate the scientific function of risk assessment from the policy making function of designing regulatory responses. Both rest on the assumption that the resolution of scientific issues in the context of individual regulatory proceedings creates the possibility of inconsistency. In statements supporting his bill Congressman Wampler has cited episodes, such as the abortive FDA-USDA plan to regulate nitrite,[344] to underscore the need for improved scientific analysis as a foundation for regulatory decisions.

The Wampler bill and the AIHC proposal both represent attempts to remove ultimate responsibility for scientific judgments from the regulatory agencies. However, comparison exposes important differences between the two proposals. Wampler's bill provides that any party could request referral of scientific issues to the National Science Council.[345] The AIHC proposal originally contemplated that the agency alone would have the authority to refer scientific questions to a central science panel.[346] By its terms, the Wampler bill would apply only in formal adjudications, a limitation that would exclude most decisions concerning carcinogens.[347] Under the AIHC proposal, an agency contemplating rulemaking, on its own initiative or upon request, could refer scientific questions for independent review by the panel. Because hazardous substances are regulated primarily through rulemaking, the AIHC proposal would have a far greater impact.

---

[340] *Id*. at 21.

[341] National Science Council Act of 1980, H.R. 638, 97th Cong., 1st Sess., 127 Cong. Rec. 2, 67 (1981).

[342] Wampler bill § 3(1)(B)(2).

[343] American Industrial Health Council, "A Proposal to Achieve a Cohesive, National Cancer Policy," May 24, 1978.

[344] Congressional Record, Sept. 12, 1979, H7786–7791.

[345] *See* Wampler bill § 5 and § 19, which amends a variety of regulatory statutes to provide that only party to an adjudication conducted on the record may refer a question of scientific fact to the Panel.

[346] *See* AIHC, "A Proposal to Achieve a Cohesive National Cancer Policy," May 24, 1978, p. 3. "Operating Procedures."

Congressman Wampler's bill would make decisions of the National Science Council binding on any agency.[348] An agency would not, however, be bound by the AIHC's science panel's conclusions.[349] Rather, there would be a presumption that the agencies would accept the Panel's findings in any subsequent regulatory action.

The two bodies would also differ in composition and procedures. Wampler's bill contemplates that individual chemicals would be assessed by ''advisory panels'' to the National Science Council, which itself would be a standing body of fixed membership.[350] Membership on the advisory panels would, however, be restricted to members of the Council and no panel could have fewer than five voting members.[351] The AIHC would allow its science panel to establish subcommittees or ''working groups'' which could include, or be composed largely of, outside experts.[352] Wampler's National Science Council would be composed of 15 full-time voting members serving two-year terms.[353] The AIHC recommends 15 part-time members who would serve for terms of three years.[354] These divergent approaches to the question of full- versus part-time appointment appear to reflect different expectations about which status would be more likely to attract the best scientists. The AIHC approach assumes that scientists would be unwilling to devote their full time for a fixed term but might be persuaded to participate if appointment entailed a less burdensome commitment.

Under the Wampler bill, the National Science Council would decide questions of scientific fact after conducting ''a hearing on the record.''[355] Notice of the hearing would be given to all parties to the agency adjudication. The Council's proceedings would be formal, reinforcing its quasi-judicial character.[356] the AIHC proposal, by contrast, makes no reference to "on the record" proceedings. An agency would simply announce referral of a scientific issue to the Panel[357] and invite public comments. The less formal procedures visualized by the AIHC are consistent with the basic character of its proposal, i.e., to elicit high-level but non-binding judgments on scientific questions underlying regulatory decisions.

---

[347] Wampler bill § 5. ''The Council shall decide . . . any question of scientific fact arising in any agency adjudication on the record. . . .'' *See also* Testimony of Peter Barton Hutt before the House Subcommittee on Department Operation, Research, and Foreign Agriculture, June 23, 1981 p. 2.

[348] Wampler bill § 3(1)(B).

[349] AIHC Proposal at 3. *See also* Memorandum of AIHC Counsel: ''As noted above, the bill would require an agency to accept the Panel's finding and some might think it preferable to the AIHC Proposal in terms of expediting the regulatory process. On the other hand, the AIHC Proposal might meet with less opposition from the regulatory agencies because they would have an option of disagreeing with the Panel.''

[350] Wampler bill § 7(a)(1).

[351] *Id.*

[352] AIHC Proposal at 6.

[353] Wampler bill §§ 15(a)(1)(A), 15(c)(1).

[354] AIHC Proposal at 4.

[355] Wampler bill § 5.

[356] *See* generally Wampler bill § 8.

A final important distinction is apparent in the time limits placed on the National Science Council by the Wampler bill. Under the bill, the Council would be expected to make a final report to the referring agency within 90 days of receiving a dispute.[358] The AIHC proposal, in contrast, expressly imposes no specific time limits on the Panel's decisionmaking,[359] reflecting a more realistic understanding of scientific and logistical complexities likely to confront any new advisory body.

c. *Responses to the proposals.* The four agencies have responded critically to these proposals to separate and centralize the function of assessing the risk of chemicals that are candidates for regulation.[360] Other observers have also suggested flaws in the proposals. No attempt is made here to attribute specific criticisms, except where they are based on the distinctive experience of particular agencies. The purpose is to convey the basic criticisms of the Wampler bill and AIHC proposal.

Perhaps the central criticism is that the theoretical distinction between risk assessment and the choice of regulatory options is oversimplified.[361] Like the proposals themselves, this argument is imprecise. Assessment of the toxicological data for a chemical and characterization of its propensity to induce cancer are surely different functions than determination of the costs of controlling exposure. Different disciplines are required to perform them. It is surely possible, in practice as well as in theory, to distinguish between estimating the risks posed by a chemical and deciding whether the risk estimated is acceptable.

---

[357] AIHC Proposal at 6. The AIHC proposes that upon referral of an issue to the Panel by a regulatory agency, the agency would publish a notice of the referral in the Federal Register, inviting the public and other agencies to submit relevant data to the Panel.

[358] Wampler bill § 10(a)(1).

[359] AIHC Proposal at 3.

[360] *See* Testimony of Elizabeth Anderson, *supra*, note 338: "EPA does not think that H.R. 638 is an appropriate way to ameliorate the very real problem which it addresses, namely that the very best available scientific data and principles be used in setting health based standards and regulations." *See also* Testimony of Mark Novitch, Deputy Commissioner, U.S. Food and Drug Administration: "[T]his bill would . . . add another bureaucratic layer to the regulatory decision-making process with attendant waste of time and money."

[361] Testimony of Mark Novitch, *supra*, note 360: "[D]ecisions involving safety issues are only partly scientific: the scientific elements of a decision are closely related to its policymaking, legal, and regulatory elements. The answer to the question of whether a substance is harmful depends as much on the criteria or the standard one uses to judge harmfulness as on the technical facts. Assigning to a governmental body that is separate from the responsible regulatory agency the task of making a binding scientific decision in isolation from these other central elements could result in worse decisions, greater inconsistency, delayed administrative procedures, increased public confusion, and diminished public confidence."

In two important respects, however, those who argue against institutional separation of the functions of risk assessment and regulatory policymaking make a valid point. First, they stress the large uncertainties that surround the central issues involved in regulating a chemical.[362] The agency responsible for deciding what exposure to permit or what costs to impose, the argument runs, must make what is ultimately a political judgment based on imperfect knowledge about every element.[363] For its decision to be politically acceptable, the agency must have responsibility for all of its components and the ability, throughout the process, to explore their relationship.[364]

This argument does not rebut all of the justifications for centralized risk assessment or preclude adoption of some features of the AIHC/OSTP proposals. It is not, for example, inconsistent with requirng an agency to consult with an expert advisory panel about the risks posed by a chemical before deciding whether or how to control it. The argument does, however, conflict with the concept of complete institutional separation of the risk assessment function.

The second argument against bifurcation speaks to the internal process by which agencies reach decisions on complex matters. The contention is that this process is unavoidably an iterative one.[365] Different specialists are called on repeatedly for analysis and advice as the agency identifies and considers new control options in attempting to reach a decision. While this description may overstate the fluidity of internal agency deliberations, it captures something of their unpredictable character.

Regulators often must decide how to control a chemical to which humans are exposed in several different ways. This has implications for the analyses they must perform, as an example will reveal. Assume, first, that an agency desires quantitative estimates of the cancer risk for all exposed groups and, second, is permitted to balance control costs. As the agency explores the options for controlling exposure it often will discover new ones that it had not originally considered, or new combinations of controls, e.g., in the case of a pesticide, new restrictions on crop use combined with a new method of measuring residues and new instructions to applicators. If the agency has not anticipated this set of options, the independent scientific panel would not (unless it were clairvoyant) have estimated the risk remaining if they were imposed. It is unrealistic to expect that any agency, or the parties before it, will have thought of all of the options at the time the panel performs its original risk assessment.

---

[362] *See, e.g.*, Testimony of Mark Novitch, *supra*, note 360, pp. 6–7.

[363] "Testimony on Decision Making Processes for Food Safety and Quality Issues," Sherwin Gardner, Vice President, Grocery Manufacturers of America, Inc., June 23, 1981, p. 5.

[364] Testimony of Elizabeth Anderson, *supra*, note 338, p. 6: "[T]he risk assessment process is not accomplished in a single encounter as the Council might be forced to do, but rather it requires an ongoing interchange between scientists inside and outside the regulatory agencies who need to interpret the implications of the scientific evidence for regulatory decisions. Having the scientific evaluation process removed from the agencies would seriously impede those interactions and thus hinder the regulatory decision making process."

[365] *See id.* at 6.

It is important to recognize that the assessment of risk and the choice of controls meet in the evaluation of exposures to a chemical. Quantitative assessment of the risks posed by exposure to a chemical requires information about the character and magnitude of human exposures.[366] But these are often the most uncertain elements of an agency's decision as well as the most likely to vary with the control measures selected.[367] The problem identified here could be avoided if the independent panel were only asked to characterize the chemical and estimate its effects under varying conditions of exposure. The agency would then be left to determine what exposure conditions prevailed, or could be achieved through regulation, and to apply the panel's dose-response model in performing its own quantitative estimates of risk.

Other criticisms of the Wampler and AIHC proposals stress the logistical difficulties of meshing independent risk assessment with the internal workings of different agencies.[368] Experience suggests that it will be difficult for any risk assessment body to meet rigid time limits. It is thus probable that agency decisions will be delayed by a requirement to consult with, or refer issues to, such a body.[369] Given the current glacial pace of decisionmaking, however, the increased delay can hardly be viewed as a decisive argument against the proposals.

EPA's experience with a comparable body—its own internal Carcinogen Assessment Group (CAG)—suggests another potentially more serious problem. CAG was created in 1976 to centralize agency evaluation of potential carcinogens for all of EPA's regulatory programs.[370] It consists of approximately a dozen EPA scientists headed, until recently, by a distinguished academic researcher. As more EPA program units sought its assistance in evaluating chemicals, CAG became overburdened and its output grew unpredictable.[371] CAG failed to develop a mechanism for setting priorities and requests for its advice have sometimes languished for many months. One consequence of this delay has been that EPA's Office of Pesticide Programs began relying on its own scientists or on outside contractors, forfeiting whatever expertise CAG could provide.[372]

Critics of the Wampler-AIHC proposals also challenge the assumption that the regulatory agencies have applied inconsistent criteria and reached inconsistent conclusions in evaluating different chemicals.[373] Until EPA recently declined to initiate regulation of formaldehyde[374] after the CPSC had proposed to ban UF foam insulation,[375] it would be difficult to cite an example of inconsistency. To be sure, the agencies have often selected different control options or specified different exposure limits for the same chemicals, but such disparities have typically reflected differences in exposure (and thus in estimated risk), or, more commonly, in statutory requirements. The claim that a single risk assessment body is needed to avoid inconsistencies among the IRLG agencies is difficult to support.

---

[366] *Id.* at 4.

[367] *See, e.g.*, Merrill, Consumer Products at 1349, 1366.

[368] Testimony of Elizabeth Anderson, *supra* note 338, p. 7; Testimony of Peter Barton Hutt, Esq., pp. 6–9.

[369] Testimony of Mark Novitch, *supra* note 360, p. 10.

[370] Risk Assessment in the Federal Government at 105.

[371] Interview with Steven Jellinek, *supra* note 297.

[372] *Id.*

[373] Testimony of David D. Doniger, Natural Resources Defense Council, Before the House Subcommittee on Departmental Operations Foreign Agriculture, June 23, 1981, p. 2. *See also* Testimony of Elizabeth Anderson, *supra* note 321, p. 9; Testimony of Mark Novitch, *supra* note 345, p. 10.

[374] *See* [1982] Chemical Regulation Reporter 1207 (BNA).

A more convincing argument for centralization is that it might expedite, and in any case would reduce the administrative costs of, decisionmaking when two or more agencies contemplated regulation of the same substance. If it made sense to seek the advice of independent scientists on the risks it posed, there is a good deal to be said for having one panel perform this function for all interested agencies. This was the rationale for the IRLG's request to the National Toxicology Program to empanel a group of scientists to evaluate the CIIT study of formaldehyde.[376] Although the panel's confirmation of formaldehyde's carcinogenicity does not appear to have stilled industry criticism nor produced agreement among the agencies, the concept merits continued investigation.

The Wampler bill has been criticized on several other grounds. The prescription that members of the National Science Council be full-time appointees has been termed unreliable.[377] The bill's conception of a quasi-judicial body making binding determinations of scientific issues seems excessively formal. The bill conjures up images of presentations orchestrated by attorneys, punctuated by legal challenges, and based on rules of evidence.[378] Its limitation to agency adjudications would effectively exclude most controversial regulatory proceedings. Telling criticims of the Wampler and AIHC proposals are, thus, numerous. The former proposal, in particular, seems ill-adapted to the institutional and legal context in which regulatory agencies now operate. The operational flaws apparent in these proposals, however, should not entirely obscure the fundamentally sound objectives for regulatory decisionmaking that they embody. The proposals correctly emphasize the analytical distinction between the assessment of risk and the choice of regulatory options. They recognize the value of independent scientific review of agency assessments of carcinogenicity and risk. And they stress the need for government-wide consistency in the scientific bases for health safety regulation.

F. Generic Criteria for Regulating Carcinogens

1. Introduction

As Professor Scalia has observed,[379] the 1970's saw a veritable explosion of rulemaking by federal agencies. Administrative law scholars and practitioners had previously advanced several reasons to support such an approach to regulatory policymaking. ''Generic rulemaking''[380] promised efficiencies in resolving individual cases that would otherwise relitigate recurrent issues.[381] Informal rulemaking was also touted as a less expensive, more accessible process for diverse interests to make known their views.[382] Judges endorsed rulemaking as a means of clarifying agency policy and injecting predictability into agency decisions.[383]

---

[375] *See* Merrill, Consumer Products at 1357–61.

[376] *See* text accompanying notes 236–40 *supra*.

[377] *See, e.g.*, Testimony of Peter Barton Hutt, Esq., before the House Subcommittee on Departmental Operations, Research, and Foreign Agriculture, June 23, 1981, p. 9.

[378] *Id.* at 5–6.

[379] A. Scalia, *Vermont Yankee: The APA, The D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 376–77.

Two of the agencies studied for this report—OSHA and FDA—have attempted to use rulemaking to establish generic standards for carcinogens.[384] Neither agency's experiment has yet been implemented. OSHA promulgated comprehensive criteria for evaluating and regulating workplace carcinogens in 1980, but litigation delayed implementation and the Reagan administration has indicated its intention to rethink these regulations.[385] FDA's initiative, originally proposed in 1973, still remains unfinished.[386] The two agencies' approaches, though resting on common scientific and legal promises, are not parallel. FDA's proposal addresses a narrow though complex set of issues encountered in regulating a single class of products, animal drugs; by contrast, OSHA's generic carcinogen regulations span all of the issues it has encountered in setting health standards that pose a risk of human cancer. The two efforts illustrate both the advantages and difficulties of attempting to resolve complex scientific and policy issues by general rule.

To evaluate the success of these efforts—and the utility of generic rulemaking in health and environmental regulation generally—one should understand why they were undertaken. Conversations with individuals who conceived the regulations discussed in this section provide some insights, but motivation is difficult to confirm after the fact and, in large organizations, even more difficult to attribute. Lacking complete information about original objectives, I assume that FDA's and OSHA's rulemaking initiatives had one or more of the following purposes:

(a) Rulemaking would provide a means of resolving general issues of agency policy, which could not readily be addressed in proceedings concerning specific substances. A companion objective may have been to elicit broader participation in agency policymaking.

---

[380] This common term is a non sequitur, for all rulemaking is by its nature generic and attempting to generalize from particular cases or derive principles that govern more than a single dispute.

[381] *See, e.g.*, C. Ames & S. McCracken, *Framing Regulatory Standards to Avoid Formal Adjudication: The FDA as a Case Study*, 64 Cal. L. Rev. 14, 60–61 (1976).

[382] T. McGarity, *The Occupational Safety & Health Administration's Generic Carcinogen Policy: Rulemaking Under Scientific and Legal Uncertainty* 13 (unpublished paper 1981). *See also* 40 Fed. Reg. 22950 (1975), revoked 40 Fed. Reg. 40520 (1975), and superseded 40 Fed. Reg. 40682 (1975), illustrating FDA's regard for informal rulemaking as a means of making policy.

[383] *See, e.g.*, H. Friendly, *The Federal Administrative Agencies: The Need for Better Definitions of Standards*, 75 Harv. L. Rev. 863, 878–79 (1962).

[384] The CPSC made an abortive effort to adopt criteria for evaluating potential carcinogens by general rule. *See* Merrill, Consumer Products at 1297–1303.

[385] *See* 45 Fed. Reg. 5001 (1980); 47 Fed. Reg. 187 (1982).

[386] *See* Merrill and Hutt at 496–506.

(b) Rulemaking would narrow the issues in proceedings concerning specific substances. I would include within this rationale the objective of avoiding hearings altogether, i.e., using rulemaking to support "administrative summary judgment."

(c) Rulemaking would permit agency management to clarify, and force internal adherence to, regulatory policy.

(d) Rulemaking would demonstrate the agency's concern about a problem that seemed unresponsive to case-by-case attack.

This list of purposes for generic rulemaking is both artifical and incomplete. It fails to capture the nuances of judgment that motivate collective decisions to undertake new initiatives as well as the political pressures under which agencies operate—or believe they operate. But without at least some hypothesized objectives for generic rulemaking it is difficult to evaluate the success of any effort.

Of the four objectives suggested here, only the second is clearly subject to legal constraints. Because there is a substantial body of case law dealing with administrative summary judgment and because this objective was central to OSHA's attempt to establish general rules for regulating carcinogens, some attention to these constraints is appropriate before discussing the two agency initiatives in detail.

2. *Administrative Summary Judgment*

OSHA's generic carcinogen regulations represent an attempt to apply established administrative law principles in a new regulatory context. The agency relied on three Supreme Court decisions, *Storer Broadcasting*,[387] *FPC* v. *Texaco*,[388] and *Weinberger v. Hynson, Westcott & Dunning*,[389] each of which sustained the denial of an evidentiary hearing to an applicant or licensee who challenged the agency's refusal to authorize commercial activity. Together, these cases confirm that an agency may avoid (or limit) evidentiary hearings by promulgating general criteria for decision whose applicability in individual cases is evident from undisputed facts.[390]

FDA's successful use of administrative summary judgment in the *Hynson* case involved the interpretation of scientific data and therefore is the most germane. Under the 1962 Drug Amendments to the Federal Food, Drug, and Cosmetic Act,[391] any new drug must be shown by "adequate and well-controlled" clinical studies to be effective for its labeled uses.[392] To avoid repeated litigation over the effectiveness of hundreds of pre-1962 drugs, FDA adopted regulations prescribing the features that clinical tests must have to meet the statutory standard. The agency specified that to be entitled to a hearing, a manufacturer must submit studies conforming to the regulations.[393] FDA then proceeded, summarily, to withdraw marketing approval for a large number of pre-1962 drugs whose manufacture failed to marshall evidence of the specified kind.[394]

---

[387] United States v. Storer Broadcasting Co., 351 U.S. 193 (1955).

[388] FPC v. Texaco, 377 U.S. 33 (1964).

[389] Weinberger v. Hynson, Westcott, & Dunning, 412 U.S. 609 (1972).

[390] J. Mashaw and R. Merrill, *Introduction to the American Public Law System* 483 (1975) [hereafter Mashaw and Merrill].

[391] 21 U.S.C. § 321–92.

[392] 21 U.S.C. § 355(d).

The Supreme Court upheld FDA's general procedure:

> If FDA were required to hold automatically a hearing for each product whose efficiency was questioned by the NAS-NRC study, even though many hearings would be an exercise in futility, we have no doubt that it could not fulfill its statutory mandate to remove from the market all those drugs which do not meet the effectiveness requirements of the Act.[395]

The Court did not mention the agency's inclusion of a provision for waiver of the rule's requirements; it did, however, emphasize that the agency's ability to deny a hearing depends on the obviousness of the deficiencies in an applicant's studies.[396]

The cases suggest some limitations on the use of generic rulemaking to narrow individual disputes.[397] The effective scope of administrative summary judgment, however, is more likely to be a function of context than of legal principle. An agency apparently may use rulemaking to resolve recurrent issues of fact or of policy that arise in proceedings involving similar activities. The rules upheld range from those expressing policy judgments,[398] to rules disposing of complex factual disputes, such as the design of test protocols for new medicines.[399] The need to provide an opportunity for waiver of general rules may depend on subject matter; a rule that purports to resolve technical issues in a rapidly changing field, for example, may have to contemplate more departures from the norm.[400]

---

[393] The regulations purported to provide flexibility by permitting the FDA Commissioner to accept a nonconforming study if the drug's sponsor convincingly demonstrated that the specific criteria for "adequate and well controlled" investigations should not apply. 21 C.F.R. § 314.111(2)(5)(ii)(a). For a discussion of the judicial and regulatory foundation for FDA's use of "administrative summary judgment," *see* Mashaw and Merrill at 459–89.

[394] Ames and McCracken, *supra*, note 381, at 17.

[395] Weinberger v. Hynson, Westcott & Dunning, 412 U.S. at 621.

[396] *Id.* In order to prevail at a hearing, an applicant must furnish evidence from "adequate and well-controlled investigations" since the Court "cannot impute to Congress the design of requiring, nor does due process demand, a hearing when it appears conclusively from the applicant's pleadings that the application cannot succeed." Justice Douglas stressed, however, that this applies only to regulations which are precise. While, under some criteria, a mere reading of the study submitted will indicate whether it is deficient, other criteria will call for the exercise of discretion or subjective judgment in determining the adequacy of the study. Qualitative criteria, such as "adequate" or "suitable," *see, e.g.*, 21 C.F.R. § 130.12(a)(5)(ii)*(a)(2)(i)*, "do not lend themselves to clear-cut definition and it may not be possible to tell from the face of a study whether the standards have been met. Thus, it might not be proper to deny a hearing on the ground that the study did not comply with this regulation." 412 U.S. at 621, n.17.

[397] *See* Mashaw and Merrill at 488–89; McGarity, *supra* note 382 at 29. *See also* Pharmaceutical Manufacturers Ass'n v. Finch, 307 F. Supp. 858 (D. Del. 1970).

[398] *E.g.*, United States v. Storer Broadcasting Co., *supra*, note 376.

[399] *E.g.*, Weinberger v. Hynson, Westcott & Dunning, *supra*, note 378. *See also The Use Of Generic Rulemaking to Resolve Environmental Issues in Nuclear Power Plant Licensing*, 61 Va. L. Rev. 869 (1975). *Id.*

3. *Experiments in Generic Rulemaking*

a. *FDA's "sensitivity of method" proposal.* FDA's latest attempt to establish generic rules for regulating carcinogens is expressed in a 1979 proposal outlining criteria for evaluating animal drugs.[401] To understand this initiative, one must be familiar with the statutory context.

The 1958 Food Additives Amendment to the FD&C Act was interpreted as prohibiting FDA approval, for use in animals produced for human food, of any drug that had been shown to cause cancer; this was a "food additive" use barred by the Delaney Clause.[402] In 1962 Congress amended the clause, as it applied to animal drugs, to permit FDA to approve the use of a carcinogen if the agency were convinced that "no residue" of the substance would be "found" in edible tissues of treated animals.[403] The amendment specified that FDA was to prescribe the analytical method, or assay, for verifying the absence of residues.

Progressive improvements in analytical chemistry have since confirmed that no drug administered to animals is ever eliminated entirely. FDA has thus come to recognize that the key issue under this provision is the detection, not the occurrence, of drug residues. Accordingly, FDA has proposed criteria for approving methods to search for drug residues.[404] Rather than gear those criteria to the changing capability of chemical analysis or to some fixed numerical limit, the agency defined its standard in terms of risk. It proposed that any assay approved for controlling a carcinogenic drug must be capable of measuring residues that present more than "insignificant" risk of cancer. And the agency specified a 1 in 1,000,000 lifetime risk of cancer as a quantitative measure of

---

[400] *See*, Starr v. FAA, 589 F.2d 307, 312 (7th Cir. 1978). "No statute or regulation limits the specific subject matter areas in which petitions for exemptions may be entertained. [However] it is reasonable to assume that the administrator can identify certain matters to be more appropriately subject to exemption procedures than others."

[401] 44 Fed. Reg. 17070 (1979). *See* Merrill and Hutt at 496–506.

[402] Diethylstilbesterol (DES) posed a dilemma for the FDA. While the Delaney Clause prohibited approval of new DES uses and products, the drug's approval could not be withdrawn since it was a "prior sanctioned" substance exempt from retroactive application of the Food Additives Amendment. Merrill and Hutt at 484.

[403] The so-called "DES proviso" provides:

> [E]xcept that this proviso shall not apply with respect to the use of a substance as an ingredient of feed for animals which are raised for food production, if the Secretary finds (i) that, under the conditions of use and feeding specified in proposed labeling and reasonably certain to be followed in practice, such additive will not adversely affect the animals for which such feed is intended, and (ii) that no residue of the additive will be found (by methods of examination prescribed or approved by the Secretary by regulations, which regulations shall not be subject to subsections (f) and (g) in any edible portion of such animal after slaughter or in any food yielded by or derived from the living animal.

21 U.S.C. § 360a(c)(3)(D).

[404] 44 Fed. Reg. 17070 (1979).

"insignificance." If a drug sponsor could provide a detection method capable of measuring residues posing any greater risk,[405] FDA in effect would ignore residues it could not find.

This description illustrates the thrust of FDA's proposal, but it fails to reveal importance of FDA's experiment in policymaking or the complexity of the issues it confronted. The agency had been wrestling with the problem of prescribing analytic methods for animal drugs since 1962. Its proposal is an attempt to establish durable criteria that take into account differences in the risk posed by different drugs.[406]

FDA's proposal is intended to serve the same functional purpose as the FCC's no-more-than-five stations rule, i.e., to resolve generically one of several issues that arise repeatedly in license application proceedings. But the two policies differ in important ways. Though the FCC's policy embodied several considerations respecting concentration of media ownership, it captured them in a simple rule whose application would in most cases be obvious.[407] By contrast, to determine what level of residues poses no more than 1 in 1,000,000 risk of cancer, a sponsor of an animal drug must perform a sequence of costly experiments, which are prescribed by FDA's proposal. For example, the FDA proposal specifies criteria for evaluating the potential carcinogenicity of animal drugs, standards for chronic feeding studies, and comparative metabolism studies to determine whether humans are likely to be exposed to different residues than those produced by the animals in which the drug caused cancer.[408] Each of these proposed requirements resolves complex issues about which scientists continue to disagree. Many resist the notion that these issues can or should be resolved generically.

FDA's proposal addresses other issues that are no less complex but may be more appropriate for generic resolution. First, the proposal frankly embraces quantitative risk assessment both as a technique for evaluating carcinogens and as a criterion for determining permissible exposure levels. As I have observed in Part I of this report, the issues underlying these choices, though difficult, are not likely to be sharpened by scientific advances in the near term, and sound administrative policy dictates that they be resolved consistently—at least within individual agency programs. FDA's proposal also selects one mathematical model—the linear model—for extrapolating from high-dose data from animal experiments to low-dose human exposures. The choice of an extrapolation model is, similarly, appropriate for generic resolution.

---

[405] In earlier proposed regulations, 38 Fed. Reg. 19226 (1973), FDA prescribed a mathematical extrapolation model and designated an acceptable level of risk. It specified that residues posing no greater than one in 100 million lifetime individual risk of cancer could be ignored. After an "avalanche" of comments, however, the agency accepted a risk level of one in a million. 42 Fed. Reg. 10412 (1977). The 1977 regulations were struck down on procedural grounds and later revoked by FDA. 43 Fed. Reg. 22675 (1978).

[406] Merrill and Hutt at 496–97.

[407] To be sure, there might be cases in which it was unclear whether an applicant's interest in another station constituted "ownership" for purposes of the rule, but these were likely to be rare.

[408] 44 Fed. Reg. 17096ff (1979); 44 Fed. Rep. 17084ff (1979); and 44 Fed. Reg. 17083ff (1979).

b. *OSHA's generic carcinogen policy.* While a large number of chemicals have been identified as potential occupational carcinogens, OSHA has established standards for fewer than twenty. Each proceeding to set a standard for a toxic substance has been protracted, ranging from fifteen months to over five years.[409] According to some observers, one cause of OSHA's slow pace was the enormous records that its rulemakings generated, which in turn reflected the controversy of its proposals and the scope of the issues on which it entertained comment.[410] By 1976, agency officials had become convinced that if the standard-setting process were not expedited, decades would elapse before it could regulate all currently suspected carcinogens.

On October 4, 1977, therefore, OSHA proposed general criteria and procedures for setting standards for potential occupational carcinogens.[411] Its announced objective was to obviate relitigation of the same issues in successive standard-setting proceedings. It accordingly proposed to resolve, as matters of scientific fact or administrative policy, the principles by which it would identify, classify, and regulate chemicals that posed a cancer risk to humans. The agency thus hoped to forestall reexamination of these principles in subsequent rulemakings.[412] Under the proposal, once OSHA officially classified a chemical as a workplace carcinogen, it would immediately issue an Emergency Temporary Standard and, within 60 days, propose adoption of a Model Proposed Standard requiring reduction of employee exposure to the lowest feasible level.[413] The central issues in the ensuing rulemaking hearing would be classification of the substance as a workplace carcinogen; determination of the lowest feasible level of exposure; and identification of less hazardous substitutes.[414]

---

[409] The following table illustrates the duration of OSHA's process:

Chemical Regulated	Time Elapsed from Proposal to Final Standard
Asbestos	6 mos.
14 Carcinogens	6 mos.
Vinyl Chloride	5 mos.
Arsenic	3 years, 4 mos.
Coke Oven Emissions	3 years
Cotton Dust	1½ years
Benzene	9 mos.
DBCP	5 mos.
Acrylonitrile	9 mos.

See McGarity, *supra* note 382, at 32–33.

[410] *Id.*

---

[411] 42 Fed. Reg. 54148 (1977).

[412] 42 Fed. Reg. 54154 (1977):

> OSHA . . . has determined that it is necessary at this time to the fulfillment of its statutory objectives, to reshape the size and content of its rulemaking proceedings. . . .

[413] 42 Fed. Reg. 54148 (1977).

[414] 42 Fed. Reg. 54171 (1977).

Development of OSHA's final carcinogen policy proved as difficult as any of its rulemakings for individual chemicals. The informal hearing lasted from May 16, 1978 until June 25, 1978 and generated a transcript of over 8,500 pages.[415] The full rulemaking record eventually exceeded 250,000 pages. OSHA itself offered more than forty-five witnesses, and a larger number of witnesses appeared on behalf of other participants. The final policy occupied more than 280 Federal Register pages of preamble and a dozen of regulatory text.[416] The regulations are an attempt to "codify" many of the scientific and policy premises that underlie OSHA's earlier standards and thus to discourage continued debate over what the agency regards as accepted principles of carcinogen regulation. In this respect, the final regulations adhered to the conception of the proposal, but they incorporated several changes intended to limit their dispute-foreclosing effect.

OSHA's generic regulations discuss in detail the criteria it will use in evaluating different types of evidence concerning a chemical's carcinogenicity. For example, the regulations state that the agency will accept positive results in well-designed epidemiological studies as establishing "the qualitative inference of carcinogenic hazards to workers."[417] By contrast, negative human evidence,[418] "will be considered by the Secretary" only if:

> (i) The epidemiological study involved at least 20 years' exposure of a group of subjects to the substance and at least 30 years' observation of the subjects after initial exposure; [and] . . .
>
> (iii) The group of exposed subjects was large enough for an increase in cancer incidence of 50% above that in unexposed controls to have been detected at any of the predicted sites. . . .[419]

OSHA's regulations similarly attempt to foreclose issues often encountered in evaluating annual experiments:

> (g) . . . Positive results for carcinogenicity obtained in mammals exposed to high doses of a substance will be used to establish the qualitative inference of carcinogenic hazards to workers. . . .
>
> (h) . . . No determination will be made that a "threshold" or "no-effect" level of exposure can be established for a human population exposed to carcinogens in general, or to any specific substance.
>
> (i) . . . Results based on the induction of benign or malignant tumors, or both, will be used to establish a qualitative inference of carcinogenic hazard to workers. . . .[420]

The agency's approach to evidence purporting to rebut the foregoing propositions parallels its treatment of non-positive human studies.[421]

---

[415] 45 Fed. Reg. 5001, 5008 (1980).

[416] *Id.*

[417] 29 C.F.R. § 1990.143(a).

[418] 29 C.F.R. § 1990.143(c).

[419] 29 C.F.R. § 1990.144.

[420] 29 C.F.R. § 1990.143(a).

[421] 29 C.F.R. § 1990.143.

OSHA's preamble reiterates the agency's long-standing position that the Act requires it to reduce employee exposure to substances posing a cancer risk to the lowest level compatible with industry survival and achievable by foreseeable technology.[422] The agency expressly declines to engage in cost-benefit analysis to establish such exposure limits.[423] Furthermore, its policy embodies a decisive preference for engineering controls and work practices to achieve compliance:

> This policy has been applied by OSHA in every health standard for potential carcinogens. Yet, time and again similar arguments have been made on the relative effectiveness, cost, the need for employer discretion, and other issues. OSHA has carefully reviewed all relevant aspects of the record on this issue and concludes that substantial evidence supports the continued preference for engineering and work practice controls. Accordingly, OSHA has foreclosed further consideration of this issue except under the amendment provisions. . . .[424]

4. *Impact of FDA and OSHA Rulemakings*

a. *FDA proposal.* It is probably premature to evaluate FDA's "sensitivity of method" proposal as an exercise in generic rulemaking. Like OSHA, FDA is under new management whose commitment to the agency's 1979 proposal is not known. Even in its present posture, however, the proposal permits some speculation about the advantages and limitations of generic rulemaking in the regulation of carcinogens.

FDA's proposal addresses several complex technical issues as well as the policy question of what criteria the agency should apply in approving residue assay methods, but it pales in scope beside OSHA's 300-page document. Thus the potential for mistaken resolution of issues, i.e., for enunciating general rules that do not fit numerous cases, is probably less. Nor was FDA's original proposal inspired by a desire to lay the basis for summary judgment in disputes over specific drugs. Agency lawyers later became aware that final "sensitivity of method" regulations might support summary disposition of some proceedings, but the driving force behind the initiative was the judgment of FDA managers that the agency needed a new answer to the question of how hard to search for drug residues.[425] In other words, the purpose was to change rather than codify agency policy.

---

[422] 29 C.F.R. § 1990.144.

[423] While asserting that it has routinely considered the ability of an industry to absorb the costs of more stringent standards, OSHA declined, on three grounds, to follow a cost-benefit approach in setting exposure limits:

> First, the state-of-the-art of quantitative risk assessment techniques particularly for carcinogens, that are crucial to cost-benefit analysis, is too crude and unreliable to permit the refined estimates necessary to determine risk reduction at various exposure levels. . . .
>
> Secondly, as a matter of policy, efficiency criteria alone are not appropriate because they ignore equity considerations. The economic savings from less protective regulation accrue to industry in the form of higher profits and consumers in the form of lower prices. But the costs are borne by workers through increased industrial illness and death rates. OSHA believes that it would be inappropriate for an agency statutorily required "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions" to ignore such equity considerations.
>
> Finally, OSHA believes that the correct interpretation of the Act requires the agency to reduce worker exposure to carcinogens to the lowest feasible level since no safe level can be shown.

45 Fed. Reg. 5001, 5239 (1980).

[424] 45 Fed. Reg. 5001, 5222 (1980).

It remains unclear whether the proposal has unified thinking about carcinogenic animal drugs within FDA, often a desired by-product of rulemaking. There is evidence that, in evaluating new compounds, reviewers in FDA's Bureau of Veterinary Medicine and Bureau of Foods had begun to rely on the principles underlying the proposal even before it was published. On the other hand, the time required to generate agreement on a final document may suggest that internal disputes are not readily resolved by public rulemaking.[426]

The background of FDA's 1979 proposal dramatizes both the duration of its gestation and the costs of attempting to resolve the issues it raises by general rule. The effort began in the early 1970's, when the discovery of DES residues in beef liver, using unapproved analytical methods, convinced FDA officials that the agency needed a new approach to regulating carcinogenic animal drugs.[427] In 1973 the agency published a proposed regulation, similar in broad outline to the 1979 version, on which it invited public comment.[428] Four years later, after protracted internal review of the comments and debate about the propriety of the approach proposed, FDA published a final "sensitivity of method" regulation.[429] Drug manufacturers successfully challenged this regulation in court on the ground that its contents differed too substantially from the 1973 proposal, thus sending the agency back to the drawing board.[430]

The 1979 proposal was the product of two more years' work preparing responses to earlier comments, to the court's mandate, and to advances in understanding of drug metabolism and quantitative risk assessment. For the past year there have been periodic reports in the trade press that a final regulation would soon be published, but as of this writing, the policy FDA first advanced in 1973 remains only a proposal.

---

[425] The prospect of summary disposition of individual cases loomed less important because FDA has not been heavily burdened by administrative hearings on the approvability of animal drugs. In its evaluation of applications for the approval of new products, for example, the agency has confronted only one demand for an evidentiary hearing since the passage of the 1962 amendments. But requests for hearings have been common when FDA has sought to revoke approval of already marketed drugs, and agency lawyers foresaw that it would confront many more hearing requests in the future.

[426] See note 405 *supra*.

[427] *See* Hess & Clark, Div. of Rhodia, Inc. v. FDA, 495 F.2d 975 (D.C. Cir. 1974).

[428] 38 Fed. Reg. 19226 (1973).

[429] 42 Fed. Reg. 10412 (1977).

[430] Animal Health Institute v. FDA, [1977–1978 Transfer Binder] Food Drug Cos. L. Rep. (CCH) § 38,154 (DDC 1978).

This account obscures one important product of FDA's effort. Through the three Federal Register documents FDA has illuminated the complex issues posed by Congress' instruction to be sure that "no residue" of a carcinogenic drug "is found" in human food. Furthermore, it has elicited broad, if not unanimous, agreement that a standard calibrated to the carcinogenic potency of individual drugs is a sensible solution to the problem.[431]

b. *OSHA's generic carcinogen policy.* Implementation of OSHA's regulations has been temporarily derailed. After initially proposing changes in the policy in response to the Supreme Court's benzene decision,[432] OSHA withdrew them and announced that more extensive revisions would soon be offered.[433] Later the agency proposed rulemaking, announcing its intention to reconsider the policy and staying implementation of the priority-setting requirements previously described.[434] Accordingly, it is too soon to assess the regulations' impact on OSHA's program for setting health standards. A preliminary assessment is nonetheless in order.

Participants in OSHA's rulemaking saw its objectives in different terms. Some may have hoped that the process would provide a forum for ventillating the scientific issues involved in regulating carcinogens and result in an accommodation of competing views.[435] Others believed that establishment of a "cancer policy" would help OSHA respond to sharp criticism of its slow pace in establishing health standards.[436] Finally, establishment of generic criteria, coupled with a priority-setting mechanism and prescribed rulemaking schedule, was expected to expedite the process for setting standards for individual chemicals.

OSHA's policy differs in scope and in practical effect from the regulations upheld in prior cases as supporting summary judgment. The regulations address the full range of scientific and policy issues encountered in previous rulemakings; they describe the process by which OSHA will evaluate chemicals before commencing rulemaking; and they speak to remedial issues, such as the content of standards and the desired means of compliance with them. While OSHA's regulations are thus more ambitious than similar generic rules, they are likely to have a less draconian impact.

The FCC, the FPC, and FDA relied on generic standards to avoid adjudicatory hearings on individual license applications.[437] OSHA, by contrast, is attempting to narrow the scope of future rulemaking proceedings. This distinction should make its approach less vulnerable to attack on constitutional grounds. Moreover, OSHA's regulations purport only to narrow the issues it will consider in subsequent rulemakings rather than to foreclose hearings altogether.[438]

---

[431] *See* 42 Fed. Reg. 10412 (1977).

[432] Industrial Union Dept., AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980). OSHA proposed changes in the regulations at 46 Fed. Reg. 4889 (1981).

[433] The carcinogen policy's effective data was first delayed until the end of March, 1981. Subsequently, the amendments prompted by the *API* decision were withdrawn, 46 Fed. Reg. 1900 (1981).

[434] 47 Fed. Reg. 187 (1982).

[435] See McGarity, note 368 *supra*.

[436] Interview with Grover Wrenn, former OSHA Director for Health Standards (June 26, 1981).

[437] The FCC, the FPC, the FDA all relied on generic regulations to denying claims to adjudicatory hearings ostensibly guaranteed by statute and in some cases by Constitution as well. See the Communications Act § 309, 47 U.S.C. § 309; FPC: The Natural Gas Act § 717c(e), 15 U.S.C. § 717c(e); Food, Drug, and Cosmetic Act § 505(e), 21 U.S.C. § 355(e).

> . . . [P]roceedings for individual substances under this Part shall be limited to consideration of the following issues:
>
> (a) Whether the substance, group of substances or combination of substances subject to the proposed rulemaking is appropriately considered in a single proceeding;
>
> (b) Whether the substance . . . meets the definition of a potential occupational carcinogen . . . including whether the scientific studies are reliable . . .
>
> (i) The determination of the lowest feasible level to control exposures . . . primarily through the use of engineering and work practice controls including technology and economic consideration; . . .
>
> (k) Whether suitable substitutes are available for one or more uses of [the substance] . . . ; and
>
> (l) Whether the provisions of . . . [the model standard] are appropriate. . . .[439]

In partial response to comments that its proposal would foreclose evidence on issues that are still subject to scientific debate, OSHA also included two types of "waiver" provisions.[440]

Any assessment of OSHA's carcinogen policy must start from the assumption that the regulations are valid.[441] Even making this assumption, it is doubtful whether OSHA's regulations will materially improve its efficiency in setting standards for workplace carcinogens. OSHA cannot escape rulemaking, including informal hearings, to set a standard for any chemical; its regulations expressly leave numerous issues open for individual standard-setting proceedings.[442] More important, the regulations are studiously ambiguous about the fate of arguments or evidence that challenge the agency's general conclusions but do not meet its criteria for "consideration." Notably, they do not state that such submissions will be excluded from the rulemaking record or ignored by the Assistant Secretary. This omission is understandable. Rigid notions of admissibility are incompatible with informal rulemaking, and one expects that OSHA would in fact accept many written submissions that arguably do not meet its requirements.

---

[438] OSHA Draft at 108–09.

[439] 29 C.F.R. § 1990.143.

[440] *See* 29 C.F.R. §§1990.144; 1990.145(b). The latter regulation would permit any participant to submit "substantial new evidence" on issues that are otherwise presumptively foreclosed. "For the purposes of this Part, 'substantial new evidence' is evidence directly relevant to any provision of this Part and is based upon data, views, or arguments which differ significantly from those presented in establishing this Part, including amendments thereto."

[441] For a discussion of OSHA's assertion that it possesses general rulemaking authority, *see* OSHA Draft at 81–85. *See also* Air Line Pilots Association, Int'l v. Quesada, 276 F.2d 892, (D.C. Cir. 1960), which upheld generic rulemaking where the same issue would be repeatedly presented in individual adjudicatory or licensure proceedings. See generally, *Judicial Review of Generic Rulemaking: The Experience of the Nuclear Regulatory Commission*, 65 Geo. L.J. 1295 (1977); Note, *The Use of Generic Rulemaking to Resolve Environmental Issues in Nuclear Power Plant Licensing*, 61 Va. L. Rev. 869 (1965).

[442] *See* text accompanying notes 432–33, *supra*.

While OSHA employees do not expect the regulations will result in the exclusion of evidence, they predict that the Assistant Secretary will be able to dispose of much evidence perfunctorily, thereby avoiding the delays of previous rulemakings.[443] I remain skeptical that the resulting savings will be significant. First, there will be evidence and arguments whose eligibility for full ''consideration'' will be a matter of dispute. For example, a test conducted to demonstrate that a substance produces metabolites in animals that are not produced in man will ordinarily require careful evaluation before it can be rejected.[444] The obligation to respond to pertinent comments[445] will, I believe, lead OSHA to devote time to submissions that it might technically be entitled to ignore. A standard-setting proceeding represents too big an investment for the agency to take the risk of neglecting comments that an reviewing court might later regard as material.

It is equally doubtful whether OSHA's regulations will have a major impact on the conduct of rulemaking hearings. Under the agency's practice, the presiding officer is not responsible for preparing an initial or recommended decision; his job is to keep order and be sure the record is complete. Specifically, he is not expected to rule on the admissibility of arguments or evidence.[446] Again, the risk of erroneously excluding testimony is likely to induce acceptance of everything ''for what it is worth.'' It should be noted here, as Professor McGarity has reported, that the duration of hearings was never a major cause of delay in OSHA's rulemaking process.

> Even if hearings were eliminated entirely, the pace at which OSHA proposes and finalizes regulations would probably not accelerate appreciably. . . . [T]he time consumed in actual hearings is a miniscule proportion of the time consumed between the moment the agency is asked to promulgate a standard and the time it issues a final standard. The glacial pace at which the agency has issued health standards has deeper reasons, including White House pressure to delay issuance of standards, inadequate and/or incompetent staff in the Standards Division, poor management, rapid turnover in

---

[443] Wrenn Interview, *supra*, note 436.

[444] 29 C.F.R. § 1990.144(c) provides:

> Arguments that differences in metabolic profiles can be used to demonstrate that a chemical found positive in an experimental study in a mammalian species would pose no potential carcinogenic risk to exposed workers will be considered by the Secretary only if the evidence presented for the specific substance subject to the rulemaking meets specified criteria.

The criteria then listed are a series of strict documentation and interpretation requirements indicating the agency's general skepticism for the proposition discussed.

[445] *E.g.* United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir 1973), *cert. denied*, 417 U.S. 921 (1974); Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir 1973).

[446] *See* 29 C.F.R. § 1911.15–.16.

> leadership, poor interaction between managers in OSHA and scientists in the National Institute for Occupational Safety and Health, poor interaction between OSHA and its lawyers in the Office of the Solicitor of Labor, and the requirement that OSHA perform lengthy regulatory analyses before it issues standards. While streamlining the hearings will probably enhance the agency's efficiency somewhat, it is not likely to aid the agency greatly in reaching its goal of increasing its output of health standards, if indeed, that is any longer a goal for the agency.[447]

Finally, the efficiencies provided by OSHA's regulations could be small even if the agency were never again confronted with evidence or arguments on any of the issues they presumptively foreclose. Despite the agency's protestations that it has repeatedly heard the same arguments,[448] examination of its prior rulemakings does not reveal a preoccupation with old issues. There have been intense disputes above the interpretation of specific studies—disputes that are certain to continue—and there has routinely been debate over the cost and technical feasibility of control measures—matters expressly left open by the regulations for case-by-case resolution.

Despite this generally skeptical assessment, one can identify ways in which the regulations might aid OSHA's decisionmaking. First, the regulations should help focus the issues in standard-setting proceedings by indicating what types of arguments OSHA will find convincing.[449] While individuals cannot be prevented from introducing evidence that the regulations purport to preclude, participants may not spend resources assembling information that they expect OSHA to dismiss. Second, the regulations describe the process by which OSHA expects to identify and set priorities for regulating the potentially large number of workplace carcinogens. The preparation of the carcinogen regulations might have been expected to yield other benefits, as well. The internal debate which is necessary to complete a major rulemaking can sometimes improve agency management. The need to produce a final product may precipitate agreement on disputed issues, or misunderstandings of agency policy that previously escaped attention. Furthermore, the consideration of public comments can be genuinely educational for agency officials. It can only be a matter of speculation, however, whether OSHA's effort to promulgate its generic carcinogen regulations has had or will have any of these effects.

G. Interagency Coordination

1. Introduction.

This section explores issues raised by proposals to coordinate federal regulation of carcinogens. The desirability of interagency coordination has been discussed for several years, and efforts to bring about consistency and cooperation among the four agencies were begun as early as 1976. In 1977 the heads of the four agencies formed the Interagency Regulatory Liaison Group (IRLG).[450] FDA Commissioner Kennedy and EPA Administrator Costle saw advantages in coordination for both agencies and manufacturers and users of chemicals. These included uniformity of criteria for testing and evaluation, predictability of decisions, efficiencies in inspection and enforcement, and enhanced government sensitivity to the economic costs of disparate control measures. Another less often articulated rationale for the formation of the IRLG was the belief that the agencies had to respond to claims that their decisions were inconsistent and their choice of targets largely adventitious.

---

[447] McGarity, *supra*, note 382 at 26.

[448] *See* 45 Fed. Reg. 5001, 5108–15 (1980).

[449] Given the fact that those affected by agency rules have finite resources for challenging policies, they are likely to focus most of their energies on those issues for which the agency remains open to persuasion.

The IRLG became the primary vehicle for coordination among the four (later five) agencies.[451] It functioned through eight working groups of agency scientists and regulators assigned to such tasks as criteria for evaluation of scientific evidence, inspections, enforcement, and test standards development. Later, the Carter Administration also formed the Regulatory Council, which assumed as one of its first responsibilities the development of a government-wide ''cancer policy.''[452] The activities of the IRLG working groups are too diverse to describe or evaluate here;[453] many had little impact within the agencies, much less outside.

The IRLG coordination umbrella was folded during the early months of the Reagan Administration, which substituted a new, but much less elaborate, coordinating apparatus, headed by the Office of Science and Technology Policy in the Executive Office of the President[454] and consisting of the heads of the five IRLG agencies. Precisely what role this new group will play in overseeing government evaluation and regulation of carcinogens cannot now be predicted. This section, therefore, will focus on activities of the IRLG and on specific proposals for coordinated regulation of specific chemicals that drew attention during its period of operation.

2. *The Concept of Coordinated Regulation*

The formation of the IRLG increased interest in the possibility of joint or coordinated proceedings involving chemicals subject to regulation by two or more agencies. One of the original IRLG work groups was assigned responsibility for identifying chemicals of potential interest to two or more agencies.

The notion of coordinated regulatory proceedings has intuitive appeal; it appears to promise efficiencies for both government regulators and private parties and to assure that different agencies will not arrive at inconsistent decisions. While agencies have often cooperated in regulating specific chemicals,[455] however, the operational meaning of coordination has remained undefined. The following discussion identifies three goals of coordinated regulation and then examines, by hypothesis and example, ways in which the four agencies might collaborate.

---

[450] Regulation of Toxic and Hazardous Substances: Interagency Agreement, 42 Fed. Reg. 54856 (1977); see also 43 Fed. Reg. 7174 (1979).

[451] The Food Safety and Quality Service of the Department of Agriculture joined the IRLG in 1979. See 44 Fed. Reg. 39858 (1979).

[452] *See* Statement on Regulation of Chemical Carcinogens; Policy and Request for Public Comments, 44 Fed. Reg. 60037 (1979).

[453] The IRLG formed eight different working groups responsible for formulating policies for coordination in such areas as monitoring of research laboratories, establishment of test guidelines, and development of regulatory actions.

[454] *See* 1 Inside O.M.B., No. 3, p. 1, February 1, 1982.

a. *Coordinated rulemaking.* "Coordinated rulemaking" has been used to epitomize what is meant by coordinated regulation, but this description is not ideal. "Coordination" may include a variety of cooperative activities that do not lead to, or require, public rulemaking. Furthermore, the term "rulemaking" is underinclusive because some statutes do not permit regulation of chemicals through promulgation of rules. For example, an action by EPA to cancel a pesticide's registration must offer the full range of procedural safeguards associated with formal adjudication under the APA.[456] In other contexts, an agency may have a choice between rulemaking and adjudication. But most attempts to regulate carcinogens have taken the form of rulemaking. Three of the four programs studied here—the exception being EPA's regulation of pesticides—utilize rulemaking. The reader should, however, remain cognizant of the possibility that some chemicals cannot be regulated through rulemaking, collaborative or otherwise. This possibility is both a reminder, and a product, of the variety of statutory procedures that govern the four agencies.

b. *Rationales for coordination.* The idea of interagency coordination in the regulation of carcinogens is appealing for several reasons. Most chemicals regulated as carcinogens have fallen within the jurisdiction of two or more agencies. Indeed, few chemicals produced in this country would not fall within the jurisdiction of at least two agencies: OSHA, which would be responsible for protecting workers engaged in production of a chemical, and the agency (or agencies) responsible for its commercial uses. As a practical matter, some potential carcinogens may be of concern to only one agency. A few chemicals are no longer in production, and thus American workers are therefore no longer exposed to them, but they remain in the environment and thus, accessible to humans.[457] An example is aflatoxin, a carcinogenic mold that occurs naturally on many grains, which is of interest only to FDA. Such exceptions are not unimportant, but virtually all chemicals that currently are candidates for regulation as carcinogens fall within the jurisdiction of two or more agencies. Accordingly, it seems logical to explore ways of coordinating agency efforts to evaluate and regulate carcinogens.

---

[455] Perhaps the most notable example was the collaborative efforts of FDA, EPA, and the CPSC in regulating aerosol uses of chloroflurocarbon propellants, whose emission is believed to damage the ozone layer and increase the risk of skin cancer from ultraviolet radiation. See 42 Fed. Reg. 24535 (1977).

[456] *See* FIFRA § 6(d), 7 U.S.C. § 136d (1978).

[457] For example, FDA still monitors the food supply for the occurrence of residues of pesticides whose registrations have long since been cancelled by EPA. The tolerances FDA enforces are generally those established by EPA.

Three primary objectives of coordination can be identified: assurance of consistent decisions; administrative economy, with savings both for agencies and for members of the public; and coherent implementation of controls. While these are laudable goals, they require clarification.

(i) *Consistent decisions.* A few years ago a Wall Street Journal editorial chastised the three agencies for reaching inconsistent decisions on the same substance.[458] The Journal pointed out that OSHA, FDA, and EPA had established different exposure limits for acrylonitrile, a plastic that has many useful applications but also the capacity to cause cancer in laboratory animals. OSHA had set an occupational health standard of 2 ppm; EPA had established a higher limit on acrylonitrile as an air pollutant; and FDA had attempted to ban its use in the manufacture of plastic bottles because minute amounts could leach into the beverages they contained. For the Wall Street Journal, these disparate standards demonstrated that federal regulation of toxic chemicals was in disarray.

To be fair, the editorial writer did not attribute the problem to any failure of the agencies to cooperate, but rather to Congress' failure to develop a coherent "cancer policy." The example does, however, reveal the importance of refining consistency as a rationale for coordinated regulation. A study of their actions on acrylonitrile reveals that the three agencies were in agreement on the scientific issues common to their decisions. Each concluded that the experimental data demonstrated that acrylonitrile is a carcinogen. The agencies also generally agreed in their assessment of the risk to humans who inhaled or ingested acrylonitrile, i.e., no level of exposure could be assumed to be without risk. To be sure, each agency looked to different data in evaluating the exposures for which it was responsible. Most exposure issues, i.e., whether it is likely to occur and at what levels, are parochial rather than common. Since any quantitative assessment of risk turns on predicted levels of exposure, estimated risks are also likely to differ. However, the choice of an extrapolation model for quantifying the risk of different exposures is potentially a common issue. The choice of model is likely to be a function of regulatory philosophy, on which government-wide consistency might be expected, or of a model's compatibility with the data, which ordinarily are the same for all agencies.[459]

The exposure limits that EPA, OSHA, and FDA set for acrylonitrile were determined only in part by their assessments of risk. The primary determinant of FDA's decision that the bottles could not be sold was the "no risk" standard of the Food Additives Amendment.[460] Similarly, OSHA's exposure limit was dictated by its interpretation of the "feasibility" criterion of the OSH Act[461] the issue least susceptible of "consistent" resolution is what exposure to a carcinogen is acceptable. Exposures vary widely and governing laws understandably set different standards. It is accordingly understandable, not surprising, that agencies might choose different exposure limits.

---

[458] "A Low Growth Microcosm," Wall Street Journal, October 10, 1978.

[459] *See* Risk Assessment in the Federal Government at 34–40.

[460] *See Monsanto Co. v. Kennedy*, 613 F.2d 947 (D.C. Cir. 1979).

[461] *See* Occupational Exposure to Acrylonitrile, 43 Fed. Reg. 45762 (1978).

While this discussion suggests the limits of the consistency rationale, it also reveals areas appropriate for coordination. It is one thing for government agencies to set different limits to different hazards. It is quite another for government to provide conflicting answers to such questions as whether a chemical is capable of causing human cancer.

(ii) *Process efficiencies*. Because agencies engaged in regulating the same chemical must explore many of the same scientific questions, it would seem sensible to develop procedures that permit these questions to be resolved once. These questions are likely to surround interpretation of the data relating to the chemical's behavior in mammalian systems and its carcinogenicity. The interpretation of a single animal experiment may give rise to a dozen contested questions.[462] A unitary procedure for resolving such questions has considerable appeal. The agencies should save time, and each should gain the aid of the others in assembling, presenting, and evaluating data. Private parties, who might otherwise expect to participate in each proceeding at which the chemical's fate is at issue, would have to make their case only once. Scientists whose studies are in dispute and other experts who might testify would be spared repetitive appearances.

There may also be efficiencies in unified exploration of other issues. I have suggested earlier that exposure issues typically differ for each agency, but exposure data are scarce and costly to obtain. Regulators must therefore often rely on estimates and inferences based on other measured exposures.[463] A study of exposures in one setting may reveal valuable information about how the chemical behaves generally. Furthermore, even when exposure issues differ for each agency, they may not be decisive in determining what steps should be taken to control a chemical. If a chemical were of concern to only two agencies, for example, the toxicity and risk issues might dominate, making it efficient to resolve them in a common proceeding. Furthermore, exposure issues may occasionally be nearly identical for different agencies. An example is sodium nitrite, which is regulated by both FDA and USDA.

(iii) *Coordinated control measures*. Coordination can help prevent conflict in the implementation of controls imposed by two or more agencies. For example, when EPA and FDA restricted the production and use of chloroflurocarbon propellants in consumer products, they agreed that an immediate ban would be economically disruptive and provide slight health benefits. Accordingly, it was decided that manufacturers of consumer products would be permitted to exhaust their stocks and to use up existing supplies of the propellant. While EPA ordered production terminated almost immediately, FDA delayed its ban on commercial distribution of chloroflurocarbon-containing drugs and cosmetics to correspond to the time required to exhaust existing supplies.[464] Their cooperation, however, did not require joint rulemaking. Interagency meetings prior to the publication of separate proposals focused the timing issue, on which both agencies invited comments which were later jointly evaluated.[465]

---

[462] For a discussion of the variety of issues potentially raised by the results of animals studies, *see* IRLG, Scientific Bases for Identification of Potential Carcinogens and Estimation of Risks, 44 Fed. Reg. 39857, 39862–869 (1979).

[463] *See* Risk Assessment in the Federal Government at 20–22.

[464] *See* Fully Halogenated Chlorofluoroalkanes: Proposed Prohibitions and Notice of CPSC Action, 42 Fed. Reg. 24535 (1977).

(iv) *Other motives for coordination.* There are other reasons why agencies interested in the same chemical may wish to collaborate. Through such efforts a small agency like the CPSC, which lacks the scientific capabilities of EPA and FDA, can gain help in evaluating complex data. This, surely, was one reason that the CPSC sought the help of the IRLG and National Toxicology Program in evaluating formaldehyde.[466] Another appeal of coordination is strength of numbers. The IRLG was in part inspired by the belief of the four agency heads that health and safety regulation was under critical attack. The alliance provided strength in dealing both with outside groups and with a White House staff that was becoming increasingly concerned about the cost of regulatory controls.

3. *Obstacles to Coordination.*

The procedural impediments to joint rulemaking can be illustrated by a hypothetical example involving a current candidate for regulation, formaldehyde. A panel of government scientists, assembled to review the bioassay performed by CIIT, have concluded that formaldehyde is carcinogenic for rodents. Relying on this judgment, the CPSC in 1980 proposed to ban UF foam insulation, and early this year voted to make the ban final, although this action is based as well on formaldehyde's acute effects.[467] Formaldehyde has many commercial uses. It is a component of other consumer products and of some products under FDA's jurisdiction. workers engaged in manufacturing formaldehyde are exposed to its fumes. Finally many uses of formaldehyde are subject to TSCA. Accordingly, all four regulatory agencies might someday wish to limit formaldehyde's production, marketing, or use. If each agency acted independently, they would duplicate efforts, burdening both industry and government. Each agency's statute, however, imposes different procedural requirements for regulatory action. If the four agencies desired to collaborate, it would be necessary to determine how these diverse procedures could be meshed to meet the requirements of each law.

In this analysis I assume that the four agencies do not wish to effect a complete ban on formaldehyde, i.e., that some uses justify the attendant risk of cancer.[468] Let us assume that the tentatively agreed-upon objectives are a selective ban on certain uses of formaldehyde and specified limits on permitted exposures. A second simplifying assumption is that three of the four agencies are content to rely on a single statutory remedy. The exception is FDA, whose primary statute prescribes different procedures for regulating drugs and cosmetics, the two classes of products within its jurisdiction that contain formaldehyde.[469]

---

[465] *Id.*

[466] *See* text accompanying notes 238–243 *supra*.

[467] *See* 46 Fed. Reg. 11188 (1981); [1982] Chemical Regulation Reporter (BNA), p. 1219.

[468] Such a trade-off would not be uncommon for some prescription drugs, notably antitumor agents, whose benefits are thought to outweigh the risk of cancer in some populations. OSHA's benzene standard accepted the possibility that some workers would continue to get cancer from exposure to benzene, by implication conceding that the costs of eliminating exposure altogether were excessive.

A threshold issue is whether the four agencies should conduct a joint regulatory proceeding or conduct parallel but separate proceedings. Neither the APA nor any of the four agencies' statutes provided for joint rulemaking proceedings, but I assume that such Congressional silence does not betoken disapproval so long as all of the requirements of the APA and of pertinent regulatory statutes are met by whatever procedure is followed.[470] This assumption has two corollaries. First, any joint proceeding would have to satisfy the minimum requirements of the most demanding agency statute. I refer to this as the "highest common denominator" problem. A consequence is that in any joint proceeding one or more agencies might have to observe procedural requirements that exceed the requirements of their own statutes. This would be a practical obstacle to collaboration unless the agencies saw advantages in joint proceedings that outweighed the increased procedural cost. The second corollary is that each agency would have to make its own factual findings and draw its own legal conclusions to discharge the responsibilities delegated to it.[471]

The "highest common denominator" problem could be avoided if the four agencies simply conducted contemporaneous proceedings conforming to the requirements of their respective statutes. But this approach might sacrifice some of the advantages of a joint proceeding. For example, it could force members of the public with interests in the decisions of more than one agency to prepare duplicate submissions, to recall witnesses, and to make identical arguments to several tribunals. Furthermore, an agreement to conduct parallel proceedings could dissolve if one agency became diverted by other pressures. An agency's incentive to adhere to a common timetable would be diminished if it realized that only its proceeding would be disrupted by a delay. A joint proceeding, on the other hand, would be continuously vulnerable to the changing priorities of each agency and hostage to the least efficient.

---

[469] FDA is empowered to withdraw approval for any new drug that is found to be unsafe, see 21 U.S.C. § 355(e), or to demand proof of safety for any drug, previously marketed with an approved new drug application, whose safety comes into question. Before withdrawing or refusing approval, however, the agency must afford the manufacturer an opportunity for a formal evidentiary hearing. *Id*. The agency's authority over cosmetics is less comprehensive. It may initiate court enforcement proceedings against a cosmetic that it considers adulterated because it contains a "poisonous or deleterious substance which may render it injurious to health." See 21 U.S.C. § 361(a). On occasion it has also attempted to ban hazardous ingredients from cosmetics through rulemaking, a procedure whose legality is not clearly established. Under the agency's view of its authority, however, it could accomplish such a ban through rulemaking conducted in accordance with the informal requirements of 5 U.S.C. § 553.

[470] It is difficult to perceive the basis for legal objection to such a procedure if each statute's procedural requirements were punctiliously followed.

[471] Since the authority to regulate is conditioned on the existence of facts—or at least findings—specified in any agency's statute, and the authority is delegated to the official or body also authorized to make the requisite findings, an agency head presumably could not act on the basis of findings made by someone else—even a fellow regulator. Of course, the agency head could give weight to the findings of his colleagues in other agencies so long as the record before him supported them.

With the exception of the FD&C Act, each agency statute prescribes procedures for rulemaking beyond the minimum required by the APA.[472] The rulemaking procedures outlined in the Toxic Substances Control Act (TSCA), for example, fall somewhere between the notice and comment requirements of section 553 and the more formal procedures outlined by sections 556 and 557 of the APA. TSCA requires the EPA to provide an opportunity for an informal hearing with verbatim transcription, with opportunity for cross-examination and rebuttal if necessary to resolve disputed issues of material fact.[473]

The OSH Act mandates slightly different hybrid procedures for setting occupational health standards. Notably, the Act specifies that an informal hearing must be held if objections to OSHA's proposed rule are filed. Under OSHA practice, this hearing is presided over by an Administrative Law Judge, is transcribed verbatim, and often includes lengthy cross-examination of witnesses.[474]

As recently amended, the CPS Act prescribes the most complex procedures for rulemaking that would govern any of the four agencies. When it contemplates establishing a product safety standard or ban, the CPSC must first publish an advance notice of proposed rulemaking.[475] Furthermore, the CPSC must previously have obtained the views of a Chronic Hazards Advisory Panel.[476] Once a proposal is published, the CPS Act requires the Commission to "give interested persons an opportunity for the oral presentation of data . . . [and] a transcript shall be kept of any oral presentation."[477] CPSC hearings are more informal and typically briefer than those conducted by OSHA.

FDA would have a choice of means for restricting the use of formaldehyde in prescription drugs. Through informal rulemaking it could declare formaldehyde an adulterant under section 501(a)(3) of the FD&C Act.[478] If the Commissioner determined that a generic approach were not appropriate, however, he would have to proceed against individual products under section 505(e)[479] of the FD&C Act. That section empowers FDA to withdraw approval of a new drug application (a product license) if it determines that the drug, as composed, is unsafe. The procedure prescribed requires notice and an opportunity for a formal evidentiary hearing. By contrast, to curtail the use of formaldehyde in cosmetics, FDA could simply promulgate a rule declaring all products containing the chemical adulterated under section 601(a) of the FD&C Act.[480] Only the minimum procedures of section 553 of the APA would apply to such an action.

---

[472] FIFRA prescribes formal adjudication, 7 U.S.C. § 136d (1978); the Occupational Safety and Health Act prescribes a varient of informal rulemaking that includes an opportunity for an oral hearing, 29 U.S.C. § 655(b) (1976); and the Consumer Product Safety Act mandates a similar version of hybrid rulemaking, 15 U.S.C. § 2058(a)(2) (1976 & Supp. III 1979).

[473] 15 U.S.C. § 2605(c)–(d) (1976).

[474] *See* OSHA at 27–30.

[475] *See* Merrill, Consumer Products at 1277–78, 1374–75.

[476] Id. at 1374–75.

[477] 15 U.S.C. § 2058(a)(2) (1976 & Supp. III 1979).

[478] 21 U.S.C. § 351(a)(3).

[479] 21 U.S.C. § 355(e) (1976).

If each agency opted for the least formal procedures available to it, the minimum procedures that would all satisfy statutory requirements would be informal rulemaking, coupled with a transcribed hearing that afforded some opportunity for cross-examination. It is not obvious that each agency would prefer the least formal procedures. Assume, however, that each of the four agencies would agree to regulate formaldehyde through the most expeditious procedures compatible with its own statute, joint action might proceed as follows:

Once the agencies had agreed on the outlines of their ultimate policy, they could publish either a single advance notice of proposed rulemaking or simultaneous ANPR's. Although some of the statutes prescribe information that must be included in any advance notice,[481] it should not be difficult for the four agencies to develop a joint document, outlining the substance of the proposed rules and describing the issues they raise. To satisfy the minimum requirements of the most demanding statute, the CPS Act, at least sixty days would have to be allowed for public comments, but this period is shorter than the time likely to be allowed.[482]

Because TSCA, the OSH Act, and the CPS Act all require an opportunity for some sort of informal oral hearing on proposed rules, any joint rulemaking proceeding would have to include a hearing. TSCA requires an opportunity for rebuttal and cross-examination on disputed issues of material fact.[483] Since TSCA would probably be relied on to ban production of formaldehyde for uses forbidden by other agencies, these requirements would have to be observed in resolving the issues raised by any proposal. With respect to issues raised by limits proposed under other laws, a legislative-type hearing that permitted oral presentation would presumably suffice. Whether it would make sense to conduct different types of hearings on the distinct issues seems doubtful. It probably would be simpler to permit any proposed ban, as well as exposure and use restrictions, to be contested at a single TSCA-sufficient hearing, even though this would open each factual issue to cross-examination.

Furthermore, it should be noted, the issues to be explored at such a hearing would be as broad as required by the most elaborate statutory formula. The statutory standards applicable in our example range from the standard for determining whether a substance adulterates cosmetics, which FDA has construed as essentially precluding any risk to consumers.[484] By contrast, TSCA imposes an "unreasonable risk" standard, which arguably required EPA to weigh all measurable effects of curtailing production or use of a chemical.[485] The amended CPS Act appears now to call for some approach cost-benefit analysis.[486] In short, any joint hearing would have to address a wide range of issues, not all of which would be relevant to all agencies.

---

[480] 21 U.S.C. § 361(a) (1976).

[481] *See* the 1981 amendments to the Consumer Product Safety Act, discussed in Merrill, Consumer Products at 1374–75.

[482] *See id.* Except in an emergency, the customary practice of all four agencies has been to afford at least sixty days, and often considerably longer, for public comments on proposals to ban or restrict important substances.

[483] *See* 15 U.S.C. § 2605(c) (1976).

[484] 21 U.S.C. § 361(a) (1976). See generally Merrill and Hutt at 626–34.

Following such a hearing, the four agencies would develop final individual rules based on the common rulemaking record. Both OSHA and the CPSC would be required, within sixty days of the hearing, to issue a rule or make a determination that no rule should be issued.[487] In practice, both agencies have often postponed this deadline. Neither FDA nor EPA under TSCA is subject to time restrictions on the promulgation of final rules. Some of the statutes prescribe the form and content of final regulations.[488] If each agency were promulgating its own rule, however, any difference among these requirements should not pose a problem.

Additional problems could be raised by collaboration in evaluating the rulemaking record and in drafting final rules. First, although not likely to succeed, it could be argued that post-comment period conversations between staff members from one agency, e.g., EPA, and decisionmakers in another agency, e.g., the CPSC, would constitute inappropriate ex parte communications. While the inhibitions first suggested in *Home Box Office*[489] have been qualified in subsequent decisions,[490] this issue cannot be ignored. If staff members of one had acquired a reputation as critics of a chemical, manufacturers of cosmetics might be expected to challenge any arrangement that afforded them preferential access to decisionmakers at FDA. Yet to preclude off-the-record communications among the four agencies after the comment period would frustrate collaboration.

A second problem raised by post-hearing cooperation involves the responsibility of decisionmakers for their decisions. Courts rarely seriously entertain accusations that an official formally responsible for a decision did not make it.[491] But most such challenges have failed in the context of accusations that the decisionmaker had abdicated to his subordinates. In the present context, the Administrator of EPA, for example, might rely on the work of employees of other agencies. While one would not expect challenges asserting improper subdelegation of responsibility to succeed, they are likely to be made.

---

[485] *See* generally C. Davies, S. Gusman, and F. Irwin, *Determining Unreasonable Risk Under the Toxic Substances Control Act*, An Issue Report of the Conservation Foundation (1979).

[486] *See* Merrill, Consumer Products at 1374.

[487] *See* 15 U.S.C. § 2058(a)(2) (1976 & Supp. III 1979), and 29 U.S.C. § 655(c) (1976).

[488] For example, the Consumer Product Safety Act requires the CPSC to make and set forth a series of findings respecting the nature and degreee of risk and alternative regulatory approaches before banning a product or substance. See Merrill, Consumer Products at 1280.

[489] *Home Box Office, Inc.* v. *Federal Communications Comm'n*, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1978).

[490] *See*, e.g., *Action for Children's Television* v. *Federal Communications Comm'n*, 564 F.2d 458 (D.C. Cir. 1977); *Sierra Club* v. *Costle*, 657 F.2d 298 (D.C. Cir. 1981).

[491] *See*, e.g., *id*. The major case on the subject, of course, is *Morgan* v. *United States*, 298 U.S. 468 (1936). See also *United Steelworkers of America, et al* v. *Marshall*, 647 F.2d 1189 (D.C. Cir. 1980) (upholding OSHA's standard for occupational exposure to lead).

The foregoing discussion ignores an important area of fruitful collaboration but at the same time understates the "highest common denominator" problem. The discussion focuses on the procedures the four agencies might follow once they have decided to commence regulatory proceedings. It thus ignores the earlier stages of agency decisionmaking in which chemicals are selected for study, their risks are assessed, and the costs of different controls are investigated and debated.

The formaldehyde example provides an illustration of the opportunities for interagency collaboration in evaluating the toxicity of chemicals. Upon learning about the CIIT study, the CPSC and the other IRLG agencies asked the National Toxicology Program to assemble a group of scientists to review the data.[492] The NTP panel conducted a careful review, concluding that formaldehyde is an animal carcinogen by inhalation and has not been exonerated as a human carcinogen by any epidemiological study yet reported. If any of the other three agencies should now decide to regulate formaldehyde, the panel's findings would provide a logical starting place.

On the other hand, as a paradigm for coordinated rulemaking formaldehyde has one shortcoming. Because the agencies with jurisdiction over formaldehyde could choose to regulate under procedures that are in many respects similar, the procedural differences that may in other cases impede coordinated rulemaking are understated. An example that more vividly illustrates the potential obstacles is the food preservative, sodium nitrite.

Nitrite is used in a wide variety of meat, poultry, and other food products regulated either by FDA or by USDA. While the two agencies' jurisdictions do not overlap functionally, the FD&C Act's food additive provisions apply to meat and poultry products regulated by USDA, as well as to foods that are the exclusive responsibility of FDA.[493] A detailed analysis of the legal status of nitrite in these various products would serve no point; it is sufficient to say that nitrite's continuing uses are subject to regulation under three different statutory provisions.[494] The applicable administrative procedures range from informal rulemaking under the APA to rulemaking on a record, a process that has been criticized as among the most cumbersome in the administrative arsenal.[495] If FDA and USDA were to decide to end all uses of nitrite in meat and poultry products, FDA would be obligated to afford proponents of some uses an opportunity for a formal evidentiary hearing. Other uses, subject to different statutory provisions, could in theory be terminated after only the opportunity to submit written comments. The nitrite case is thus one in which comprehensive regulation either would follow two different schedules, or the two agencies would have to adjust their common timetable to the requirements of the more formal procedure.

---

[492] *See* Merrill, Consumer Products at 1355; Risk Assessment in the Federal Government at 122–25.

[493] *See* 21 U.S.C. § 348 (1976); see generally Merrill and Hutt, Appendix A, at 948–49; *Food Regulation: A Case Study of USDA and FDA*, Chapter 4 of Vol. V, Study on Federal Regulation, Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess. (1977).

[494] A summary analysis appears in General Accounting Office, Does Nitrite Cause Cancer? Concerns About Validity of FDA-Sponsored Study Delay Answer (1980) [hereafter GAO Nitrite Report].

[495] *See generally*, Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 Tex. L. Rev. 1132 (1972); Merrill and Hutt, at 895 et seq.

H. Public Participation in Agency Decisions

1. Introduction

This section is concerned with the opportunities for private parties to participate in and influence agency decisions concerning hazardous substances. The central question is whether agency procedures permit involvement by the several interests affected by their decisions, including users and distributors as well as persons who may be exposed. The following discussion is not intended to support recommendations concerning public fundings of participation in the administrative process. The issue of subsidizing participation is an important one, but it transcends the subject of carcinogen regulation. The purpose of this section, therefore, is to describe the opportunities current agency procedures afford for outside participation and to identify features that impede such participation.

Broad participation in the regulatory process serves three values. Perhaps preeminent is the value of fairness; the "right to be heard" before government acts adversely to important private interests is well-established in American constitutional law.[496] This right is protected by the APA and by most regulatory legislation. The current procedures of the agencies studied can be assumed constitutionally sufficient; whether they assure adequate opportunities for private persons to be heard in time to influence agency decisions is another question.

A second value served by outside participation in agency decision making is accuracy.[497] In the present context this value should rank high. Decisions concerning human exposure to potential carcinogens affect large stakes and should rest on accurate and scientific judgments. Furthermore, predictions of risk and cost require skills that agencies sometimes lack. Accordingly, it can be argued, agency procedures should facilitate participation by those in the private sector with relevant scientific and economic expertise. One expression of this argument is the demand for scientific "peer review" of agency scientific judgments.[498]

A third distinctive value is served by public participation in agency decisions concerning environmental health hazards. Such decisions take large chances with both human life and private business. Data are invariably inadequate and estimates of future consequences are problematical, but these uncertainties simply complicate an already difficult task. Determining the appropriate level of human exposure to a substance predicted to cause cancer is a normative exercise, in which there are no experts. So long as such decisions are left to regulators with only delphic congressional guidance, agency procedures should facilitate broad participation and vigorous debate.[499]

---

[496] *See generally*, Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975).

[497] *See* Mashaw and Merrill, *Introduction to the American Public Law System* 325–27 (1975).

[498] *See generally*, Risk Assessment in the Federal Government at 132–39, and sources cited therein.

The next four parts describe the opportunities for participation in the programs studied for this report. While the statutory procedures for decision making are summarized, the focus is not on what is permitted but on what occurs: Who participates in the agency's process? What opportunities are afforded for access and when? What groups have been influential? The discussion reveals diverse answers to these questions. At the same time, it suggests that agency processes have generally been open to groups interested in making their views heard. The record does not illustrate a process that is closed or unresponsive to vigorous argument.

2. *FDA Regulation of Food Contaminants*

This report treats only one FDA program, its regulation of food contaminants, which is not exemplary of the agency's general attitude toward public participation. Of the four agencies studied, FDA has the most elaborate procedures for structuring access to its regulatory proceedings and to its informal decisionmaking. It is the only one of the four agencies that initiated its own program for funding public participation in formal agency hearings.[500]

FDA's process for regulating food contaminants has not encouraged participation, however, either by public interest groups or by food distributors. The FD&C Act ostensibly requires the agency to establish formal tolerances for any toxic contaminant whose occurrence in food cannot be avoided. As described elsewhere,[501] however, FDA has eluded this directive. Instead, it has relied on so-called action levels to express the amount of contamination it is prepared to allow before it will initiate enforcement action. Action levels are simply announced by the agency, rather than set through proceedings which facilitate public participation. To be sure, FDA invites comments on the levels it announces and has said that it will consider evidence submitted by outside parties. In reality, the agency has little interest in further dialogue but, judging by the few comments it receives, neither do members of the public. Accordingly, FDA's action levels, generally determined without public participation, are the final word on most food contaminants.

Several factors explain the approach FDA has devised. First, the number of action levels FDA must set is large, and the list is continually changing as new contaminants are discovered and levels of known contaminants fluctuate. Second, precisely because food contaminants are undesired, it is often difficult to find groups informed about their toxicity or interested in defending their presence in food. Third, FDA's desire to be able to revise these "informal tolerances" on short notice has made it reluctant to adopt any procedure that required public proceedings. Finally, the agency's reservations about the toxicological data and economic predictions underlying most of its action levels have discouraged it from assuming an obligation to "publish" its decisions. It has therefore been content with a process that does not encourage participation.[502]

---

[499] See, *e.g.*, Merrill and Schewel, *FDA Regulation of Environmental Contaminants of Food*, 66 Va. L. Rev. 1357, 1384–85, 1433–40 (1980).

[500] *See* 41 Fed. Reg. 35856 (1976) (advance notice of proposed rulemaking); 44 Fed. Reg. 23044 (1979) (proposed rule); 44 Fed. Reg. 59174 (1979) (final regulations establishing criteria and procedures for financial grants to support public interest participation in formal hearings).

[501] *See* Merrill and Schewel, Environmental Contaminants, at 1382–91.

A notable exception is PCB's, one of the most ubiquitous contaminants, whose levels in food have remained a concern to the Environmental Defense Fund. Over several years EDF lobbied FDA to set, and later to reduce, tolerances for PCB's in fish and other commodities.[503] This example suggests that outside groups can influence FDA's decisions about a contaminant if they are persistent. EDF has certainly been influential, perhaps instrumental, in persuading FDA to reduce the tolerance for PCB's in fish. The agency's recent agreement that the tolerance should be reduced precipitated the first demand for a formal hearing under section 406—by Great Lakes fishing interests. The ongoing hearing will afford both groups ample opportunity to persuade FDA that its assessment of the health effects of PCB's and its prediction of the economic effects of a 2 ppb tolerance are erroneous.[504]

Distributors of food have another means to contest FDA's decisions. Since an action level is not a binding regulation, a distributor whose food is seized can challenge FDA's claim that the contaminant is likely to render the food injurious to health. One seafood distributor, whose shipments of mercury-contaminated swordfish FDA had attempted to enjoin, did precisely this, and persuaded the trial court that FDA's .5 ppm action level for mercury was unsupportable.[505] Other efforts to contest FDA's action levels in enforcement proceedings have not generally been successful, however.[506] Furthermore, this is a mechanism available only to food distributors who believe the FDA's levels are too low; someone who regards them as too lenient must concentrate initially on the generally perfunctory administrative process.

FDA has not sought outside help in evaluating the health effects of food contaminants, an approach I have recommended.[507] The agency appears often to have set its action levels to avoid destruction of substantial quantities of food. This may be justified by a balanced assessment of the potential health effects of existing contamination levels. Such an approach, however, shelters FDA's judgments from external scrutiny; the agency's process for setting action levels does not facilitate participation by outside groups, and the results do not provoke food distributors to resist.

---

[502] *Id.*

[503] *Id.* at 1416.

[504] See Food Chemical News, August 20, 1979, p. 24–25.

[505] *United States* v. *Anderson Seafoods, Inc.*, 447 F. Supp. 1151 (N.D. Fla. 1978), *aff'd*, 622 F.2d 157 (5th cir. 1980).

[506] *See, e.g., United States* v. *Boston Farm Center, Inc.*, 590 F. 2d 149 (5th Cir. 1979). *See generally*, Merrill and Hutt, at 95–106.

[507] *See* Merrill and Schewel, Environmental Contaminants, at 1439–40.

3. *CPSC Regulation of Chronic Hazards*

Of the four agencies studied, the CPSC appears to have been the most receptive to third-party influence. All of the substances the agency has attempted to regulate as potential human carcinogens were the subject of formal petitions from public interest groups.[508] It is a matter of debate whether any of these petitions was responsible for the Commission's action, but they certainly were influential in hastening decisions. The record is less clear concerning the CPSC's receptivity to arguments submitted by distributors of products considered for regulation.

During the 1970's the CPSC conducted public proceedings on several proposals to regulate potential carcinogens. It initiated rulemaking proceedings to effect bans on vinyl chloride, asbestos in patching compounds and emberizing materials, benzene, and formaldehyde.[509] In each instance, consumer groups as well as manufacturers and distributors participated by filing data and comments. The form of these proceedings, informal rulemaking in all cases except one, permits participation by any organization equipped to prepare and submit comments, and does not impose costs likely to discourage involvement by organizations with modest resources. Furthermore, the CPSC's liberal freedom of information policy assured public access to materials before the agency, including draft recommendations of staff offices.[510]

Two of the CPSC's initiatives do not fit this description of ''open decisions openly arrived at.'' In regulating TRIS, the Commission selected a legal approach that obviated any administrative proceedings, and ultimately remitted manufacturers and distributors to challenges in court.[511] The public interest group position obviously was heard in this case, for EDF's petition pressured the agency to act when it did and outlined the legal procedure it chose. It also appears that producers of TRIS-treated fabric were heard informally on the scientific and economic issues.[512] However, the CPSC's approach, which it has not since repeated, effectively precluded dispassionate debate about the hazards of TRIS in an administrative forum.

The second exception is the agency's handling of hairdryers containing asbestos. The CPSC resolved this dispute by negotiating agreements with manufacturers and distributors to cease distribution of the hairdryers and to repurchase models in consumer hands.[513] It can scarcely be contended that industry interests were deprived of an opportunity to be heard, since any distributor could have demanded formal hearing under section 15.[514] And though EDF, which had petitioned for a ban, was not a party to the discussions between the Commission's staff and the distributors, its views obviously were known within the agency. If the Commissioners' approach harmed any interest, it was the public's interest in learning why the risk posed by the hairdryers justified the remedy that the agency demanded.

---

[508] *See* Merrill, Consumer Products, at 1363–64.

[509] *See id*. at 1310–46.

[510] *See id*. at 1370–71.

[511] *See id*. at 1323–32; *United States* v. *Articles of Hazardous Substance*, 588 F.2d 39 (4th Cir. 1978). But see *Springs Mills, Inc.* v. *CPSC*, 434 F. Supp. 416 (D.S.C. 1977) (overturning CPSC enforcement policy as procedurally invalid rule).

[512] *See* Merrill, Consumer Products, at 1325.

[513] *Id*. at 1349.

[514] *Id*. at 1285–88.

4. *OSHA Regulation of Occupational Carcinogens*

If rigorous public debate is the mark of a program that has attracted the attention of affected interests, the Occupational Safety and Health Administration must be ranked a success. Its efforts to establish exposure standards for toxic materials have occasioned more controversy than any of the other programs studied for this report. Among many explanations, one is pertinent here. Unlike FDA, EPA, and the CPSC, whose programs are intended to protect individuals who have no common organizational ties, OSHA faces an organized class of beneficiaries, the labor unions.[515] Union representatives have been active participants in OSHA's standard-setting activities since 1970. Indeed, OSHA was created to institutionalize worker protection, and its location within the Department of Labor contributed to the agency's concern for, and attentiveness to, the view of organized labor.[516]

Labor unions have participated in OSHA's regulatory process in several ways. Most obvious, unions have submitted comments and presented testimony in every rulemaking proceeding to set standards for toxic materials.[517] The AFL-CIO has a small staff devoted to the study of worker safety and health, and many individual unions have added this area to their activities.[518] During the mid-1970's, organized labor precipitated several Congressional inquiries into the slow pace of OSHA regulation. Unions have also sought judicial review of most of OSHA's health standards. In the early 1970's, the AFL-CIO was perhaps the sharpest critic of OSHA's standards; more recently, union challenges appear to have been designed primarily to influence the venue of judicial review.[519]

The OSH Act affords several opportunities for participation by outside groups. First, it accords a special role to the National Institute of Environmental Health Sciences, which is supposed to provide the scientific support for OSHA's initiatives.[520] Second, section 6 of the Act specifically authorizes petitions by "an interested person, a representative of any organization of employers or employees [or] a nationally recognized standards-producing organization. . . .''[521] Petitions preceded several of OSHA's standards for toxic chemicals. Most have come from labor organizations, but OSHA's coke oven standard was a response to an industry petition.[522] OSHA's generic carcinogen policy purports to afford an additional opportunity for outsiders to influence its priorities by inviting comment on its list of candidate chemicals and its subsequent ranking of targets for regulation.[523]

---

[515] *See generally*, S. Kelman, *Occupational Safety and Health Administration*, Ch. 7 in J. Wilson (ed.), The Politics of Regulation (1980).

[516] *See* Nichols and Zeckhauser, *OSHA After a Decade: A Time for Reason*, Ch. 7 in L. Weiss & M. Klass (eds.), Case Studies in Regulation: Revolution and Reform (1981).

[517] *See* OSHA Draft at 123 et seq.

[518] Interview with Grover Wrenn, former Director of Health Standards, OSHA, June 23, 1981.

[519] *See, e.g., Industrial Union Dep't* v. *Hodgson*, 499 F.2d 467 (D.C. Cir. 1974) (challenge to OSHA standard for asbestos).

[520] *See* Risk Assessment in the Federal Government, at 109–14.

Employee organizations have also filed suits demanding that OSHA take action against specific hazards. The most prominent of these cases was begun in 1973 by the National Congress of Hispanic American Citizens, an organization of migratory farm workers, which sought to compel the promulgation of standards for the agricultural industry which OSHA had previously proposed. The plaintiffs argued that the OSH Act's time frames for rulemaking are mandatory, and triggered by any proposal. While the D.C. Circuit agreed that the Secretary of Labor had ''discretion to alter priorities and defer action due to legitimate statutory considerations,''[524] it directed the trial court to require OSHA to provide a timetable for development of the standards.[525]

The OSH Act contemplates establishment of two types of advisory committees on which worker and employer representatives are assured membership. NACOSH has recently declined in influence, but it was intended to have a role in determining OSHA's priorities.[526] Ad hoc committees to consider specific workplace hazards, such as coke oven emissions, initially had greater impact. Both labor and employer representatives considered membership to be a matter of real importance, not simply of appearance. Since 1976, however, OSHA has effectively foreclosed this avenue for participation by affected interests.[527]

OSHA's rulemakings to establish standards for toxic materials have routinely provoked an avalanche of comments and testimony from both labor and employer groups.[528] Union spokesmen have focused on health effects issues; they have rarely attempted to provide alternative estimates of the cost of achieving compliance with exposure limits, but instead attempted to deflate industry estimates. Employer groups have typically addressed the full range of issues raised by OSHA's proposals. The agency has also frequently initiated the standard-setting process by publishing an advanced notice of proposed rulemaking; this technique, mandated by the agency's carcinogen policy, affords an additional opportunity for outside interests to be heard.[529] Furthermore, judicial review of OSHA's health standards has been the rule; acquiescence has more often signalled surrender than agreement.

---

[521] *See* 29 U.S.C. § 655(b)(1) (1976).

[522] *See* 41 Fed. Reg. 46742 (1976). The industry petitioners actually sought a relaxation of the existing standard adopted by OSHA immediately following enactment of the Occupational Safety and Health Act.

[523] OSHA Carcinogen Policy, 45 Fed. Reg. 5001, 5207–08 (1980).

[524] *National Congress of Hispanic-American Citizens* v. *Usery*, 554 F.2d 1196 (D.C. Cir. 1977). See also 425 F. Supp. 900 (D.D.C. 1975).

[525] *Id.* at 1200.

[526] Interview with Charles Gordon, Esq., Office of the Solicitor, Department of Labor, June 23, 1981.

[527] *Id.* See also Wrenn Interview.

[528] *See* Risk Assessment in the Federal Government at 94–99; McGarity, *The Occupational Safety and Health Administration's Generic Carcinogen Policy: Rulemaking Under Scientific and Legal Uncertainty* (unpublished paper prepared for the National Center for Administrative Justice, April 1981).

OSHA has never provided funding for participants in its rulemaking process. Most of OSHA's health standards have applied to industries in which employees are well organized, and employers have been vigorously opposed. One former OSHA official expressed the view that the union representative sometimes lacked knowledge and sophistication.[530] This view was not, however, echoed by other observers.[531] OSHA's recent rulemaking brought forth as many as 100 witnesses and routinely produced enormous records.[532] While perhaps poor proxies of the effectiveness of participation, these figures do not suggest a process to which only one side has access.

Assessment of the impact of union and employer participation on OSHA's decisions is difficult. Different interests have been influential, but one cannot attribute their success to any particular procedural device. OSHA has modified proposed exposure limits in response to submissions from both employers and employee organizations. Their contrasting positions usually bracket OSHA's final choices; to the extent that they balance each other, both may be influential.[533]

In one respect, parity does not exist between unions and employers in the OSHA standard-setting process. Toxicological data are usually equally accessible to all participants. Studies of exposed workers, though based largely on employer-generated data, are increasingly well-publicized. But employers are thought to have a significant edge in their access to information about the feasibility of compliance with alternative exposure levels. Information about alternative methods of achieving exposure targets and their likely cost is closely held and reluctantly shared.[534]

---

[529] *See, e.g.*, 37 Fed. Reg. 13285 (1972) (NIOSH request for data on fourteen potential carcinogens); 39 Fed. Reg. 44769 (1974) (ANPRM for cotton dust standard); 42 Fed. Reg. 33043 (1977) (request for data on acrylonitrile).

[530] Interview with Anson Keller, Esq., former Executive Assistant to the Assistant Secretary of Labor for Occupational Safety and Health, August 1980.

[531] E.g., Interview with Robert Barnard, Esq. counsel to the American Industrial Health Council, August 1980; Wrenn Interview, *supra*.

[532] *See* McGarity, note 528 *supra*, OSHA Draft at 124–25 and Table I.

[533] *See, e.g.*, the discussion of union and employer submissions in *American Textile Mfgrs. Institute* v. *Donovan*, 101 Sup. Ct. 2478 (1981) (cotton dust standard); *United Steelworkers of America, et al.* v. *Marshall*, 647 F.2d 1189 (D.C. Cir. 1980) (lead standard). See also OSHA Draft at 124 *et seq*.

[534] *See*, e.g., Wrenn Interview; *American Textile Mfgrs. Institute* v. *Donovan*, 101 Sup. Ct. 2478 (1981) (accepting OSHA's estimate of compliance costs in light of agency's asserted inability to obtain detailed confidential data from industry).

5. *EPA Regulation of Pesticides*

The influence of outside groups on the Environmental Protection Agency's regulation of pesticides has fluctuated over the last decade. Originally excluded from the agency's deliberations, such organizations as EDF became important participants in EPA proceedings during the early 1970's. As the program has evolved in the past several years, however, their activities have diminished. In this same period, the role of academic scientists and agricultural interests has grown.

FIFRA is the one statute among those examined that creates legally protected interests in the production and distribution of toxic chemicals. As a licensing law it accords distinctive procedural rights to registrants and applicants for registration, i.e., manufacturers and distributors of pesticides.[535] Among other protections, they are assured an opportunity for a trial-type hearing on EPA's refusal to register a pesticide or on its decision to cancel registration. Pesticide producers have substantial opportunities to participate in EPA's decisionmaking process; indeed, they historically have supplied most of the information on health effects and on commercial utility on which the agency has relied. Over the past decade, the issue has been whether the system affords adequate opportunities for other interests—including users, environmental groups, and health scientists—to contribute to EPA's decisions.

In the late 1960's, environmental groups found the system for pesticide regulation—then administered by USDA—resistant to growing concerns about the environmental effects of many pest control agents.[536] The process for registering new pesticides had become a private dialogue between applicants and the agency. More troubling, for registered pesticides the law afforded no ready forum for public ventilation of safety questions. Between 1969 and 1972, EDF won several court victories over USDA and EPA which opened the process to public scrutiny. Two major cases established the propositions, first, that EPA could not indefinitely delay a response to petitions claiming that a pesticide posed an ''imminent hazard'' to health[537] and, second, that the EPA was obligated to initiate cancellation hearings for any pesticide about which ''a substantial question of safety'' was raised.[538] One result of these rulings was to force EPA to commence the cancellation process whenever it received data indicating that a pesticide might cause cancer. While environmental groups had no clear claim to a hearing in their own right, FIFRA did allow them to participate in any hearing requested by a manufacturer whose registration was at issue. EDF participated actively in EPA's later hearings on such agents, as DDT, aldrin and dieldrin, and heptachlor and chlordane.[539]

---

[535] *See* 7 U.S.C. § 136d (1978).

[536] *See*, e.g., *Environmental Defense Fund, Inc.* v. *Hardin*, 428 F.2d 1093 (D.C. Cir. 1970); *Environmental Defense Fund, Inc.* v. *Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971). See generally, EDF and R. Boyle, *Malignant Neglect* 117–36 (1979).

[537] *EDF* v. *Hardin*, 428 F. 2d 1093 (D.C. Cir. 1970).

[538] *EDF* v. *Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971).

[539] *See* EDF and R. Boyle, *supra*, note 536.

In 1975 and 1976, Congress and EPA each modified the system for regulating problem pesticides. FIFRA was amended to accord greater procedural protection to registrants and to require that EPA consult both with USDA and with independent scientists—the Science Advisory Panel—before initiating cancellation proceedings.[540] At approximately the same time, EPA created the "rebuttable presumption against registration" (RPAR) process, which responded to the D.C. Circuit's demand that the agency open up its internal review of pesticides considered for cancellation and simultaneously subordinated the role of formal hearings.[541]

According to EPA, deemphasis of adjudicatory hearings reflected a desire to permit broader public participation in its decisions about pesticides.[542] Hearings were thought to be expensive and time-consuming and their adversarial character offended members of the scientific community. Furthermore, since by statute a hearing followed publication of a notice to cancel registration, the public was given the "impression that the Agency had made up its mind already" about the fate of the pesticide.[543] The RPAR process introduced an opportunity for informal public debate over the risks and benefits of a pesticide before EPA initiated cancellation proceedings.

It is unclear, however, whether the RPAR process has stimulated public participation. The agency did not invite public comment on its initial list of RPAR candidates.[544] On the other hand, its regulations set low thresholds for issuance of a rebuttable presumption, thus triggering public discussion of the risks and benefits of more products.[545] Participation in the RPAR process is clearly less costly than formal appearance in an adjudicatory hearing, and does not preclude intervention in any hearing that is held. Furthermore, the amendments to FIFRA not only forced EPA to confer with USDA and SAP, they created—in SAP—an additional forum in which both registrants and opponents are able to contest the agency's assessment of risk.[546] In sum, current EPA procedures for evaluating registered pesticides afford numerous opportunities for public participation. Whether interested groups have the resources to participate effectively is, obviously, a separate question. Environmental groups are probably less involved now in pesticide regulation than in the early 1970's. But their diminished interest may have other causes, including preoccupation with other EPA programs (in particular with TSCA), reduced visibility of the pesticide program, and the increased complexity of the issues involved.

---

[540] *See* text accompanying notes 281–83, *supra*.

[541] *See* 40 Fed. Reg. 28242 (1975).

[542] *Id*. See also Pesticide Programs; Rules Governing Rebuttable Presumption Against Registration (RPAR) Proceedings; Rules of Practice Governing Hearings Under Section 6 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 45 Fed. Reg. 52628 (1980) (proposed revisions of RPAR procedures).

[543] 40 Fed. Reg. 28242 (1975). See Interview with Steven Jellinek, Former Assistant Administrator for Pesticides and Toxic Substances, EPA (June 23, 1981).

[544] *Id*.

[545] *Id*. *See* also 45 Fed. Reg. 52628 (1980).

[546] *See* text accompanying note 281 et seq, *supra*.

There are, still, two legal barriers to full participation by non-registrants. Both stem from the language in FIFRA that assures registrants an evidentiary hearing on cancellation of pesticide registrations.[547] According to the D.C. Circuit, this language does not obligate EPA to hold a hearing on an environmental group's allegations that the agency improperly failed to cancel all unsafe uses of a pesticide.[548] Following issuance of a cancellation notice for chlorobenzilate, EPA and the registrants agree to cancellation of most uses but continued registration for Hawaiian pineapples. After the registrants withdrew their hearing request EPA denied EDF's demand to be allowed to demonstrate that the hazards of chlorobenzilate outweighed the benefits of that remaining use as well. The Court of Appeals agreed that FIFRA did not accord EDF a right to a hearing on whether EPA's initial action adequately protected health and the environment. While this ruling does not diminish opportunities for third party participation in the pre-cancellation RPAR process, it allows EPA to avoid formal hearings on any decisions that do not precipitate hearing demands from pesticide registrants.

A second ruling similarly forecloses hearings at the insistence of pesticide users who wish to defend a pesticide in the face of acquiescence by its registrants to cancellation. In *McGill v. Environmental Protection Agency*,[549] farmers, operators of recreational facilities, and local governmental organizations in Mississippi unsuccessfully attempted to force EPA to hold a hearing on the cancellation of Mirex, a pesticide used to control fire ants. The Fifth Circuit held that FIFRA accorded hearing rights only to registrants or applicants for registration. The petitioners could obtain a formal hearing to explore the risks and benefits of Mirex only by applying for registration themselves.

These two rulings reflect EPA's persistent efforts to avoid formal hearings and focus public debate over controversial pesticides in the more informal RPAR process. That process affords members of the public, including registrants, at least two opportunities to submit evidence and arguments.[550] Because it lacks an oral hearing component, however, it does not allow presentation of live witnesses or cross-examination. Other laws under which carcinogens are regulated, such as the CPS Act and the OSH Act, are similarly deficient, although both provide informal oral hearings and OSHA has voluntarily accorded rights of cross-examination. Accordingly, the adequacy of EPA's process for regulating problem pesticides comes down to the question whether trial-type procedures are essential for resolving the sorts of issues these decisions pose.

The current FIFRA procedures do not accord equal access to all interested persons. The statute assures formal hearings to registrants who desire to contest cancellation; it merely permits nonregistrants to participate in hearings that are held. Registrants are thus able to control the type of procedure EPA will use in disputed cases. This preferential treatment for licensees is not novel,[551] of course, but arguably it inhibits full ventilation of the health and economic issues posed by pest control agents. It should be noted, however, that FIFRA does not otherwise accord registrants special rights. In the RPAR process, all persons stand on essentially the same footing, and if a formal hearing is held, environmental groups and pesticide users can participate on essentially the same footing with registrants.

---

[547] 7 U.S.C. § 136d(d) (1978).

[548] *See Environmental Defense Fund* v. *Costle*, 631 F.2d 922 (D.C. Cir. 1980).

[549] 593 F.2d 631 (5th Cir. 1979).

[550] *See* discussion of the RPAR process in 45 Fed. Reg. 52628 (1980).

6. *Participation in Informal Agency Decisions*

Although it did not arise in one of the programs studied for this report, a recent episode involving EPA illustrates another dimension of the public participation issue. The episode concerns formaldehyde, which two recent bioassays have shown causes cancer in rodents exposed by inhalation. The results of the first of these studies prompted the CPSC to propose a ban on UF foam insulation.[552] The five IRLG agencies had previously selected formaldehyde as one of six chemicals to be evaluated and possibly regulated jointly. Anticipating that formaldehyde might be a candidate for regulation under TSCA, EPA's staff undertook to evaluate both the positive animal data and the human studies that found no effects from exposure to the chemical. It also sought to determine the levels and duration of human exposure in settings not regulated by other agencies.

In early 1981 EPA received a petition from the National Resources Defense Council (NRDC) asking that it commence proceedings to regulate formaldehyde under section 4(f) of TSCA.[553] That provision obligates EPA to launch a formal process to consider regulation of any chemical that new information suggests may pose a "substantial risk."[554] The Act also requires the agency to respond to any petition within 90 days. NRDC claimed that the evidence of formaldehyde's carcinogenicity met the requirements of section 4(f) and threatened to sue EPA if it failed to act.

The merits of NRDC's claim are not critical in this context. What is of interest is the process by which EPA proceeded to evaluate formaldehyde to determine whether section 4(f) should be invoked. The statute says nothing about how this shall occur. Presumably it would be lawful for EPA to conduct its investigation relying wholly on its own staff and permitting outside participation. The agency's actual deliberations undoubtedly involved numerous written exchanges and meetings among staff scientists and others responsible for advising the Administrator. They also, however, included several private discussions with one group of interested parties.

In early 1981 the trade press reported that EPA's Office of Pesticides and Toxic Substances had recommended that the Administrator initiate proceedings under section 4(f) with respect to formaldehyde.[555] By September, however, it had been reported that the new Assistant Administrator had countermanded this advice and recommended no action at the present time. Thereafter, as Congressional oversight hearings later disclosed, several meetings were held between EPA's Deputy Administrator and other agency officials, and representatives of the Formaldehyde Institute and the Chemical Manufacturers Association.[556] Questioning of EPA officials revealed that the meetings dealt primarily with the interpretation of the health effects data on formaldehyde, but they inevitably also touched on whether EPA should act under TSCA. It is a matter of some dispute who was responsible for organizing the meetings. The private organizations may have initiated the dialogue as they sought to persuade EPA officials not to act against formaldehyde, but it also appears that Deputy EPA Administrator Hernandez scheduled and set the agenda for some of the sessions.[557]

---

[551] The hearing provisions of the Federal Food, Drug, and Cosmetic Act applicable to withdrawal of approval for new drugs similarly accord rights only to license holders. See 21 U.S.C. § 355(d)–(e) (1976).

[552] 46 Fed. Reg. 11188 (1981); see Merrill, Consumer Products at 1357–60.

[553] 15 U.S.C. § 2603(f) (1976).

[554] *Id.*

The importance of these private meetings stems from the fact that EPA eventually decided not to initiate regulation of formaldehyde under section 4(f).[558] Though not formally announced until February 1982, this decision has been officially ascribed to the previous September, before the meetings took place.[559] NRDC has threatened to seek judicial review of EPA's failure to act. If it does so, it will proceed without having had an opportunity to know about or respond to the contentions made by users and manufacturers of formaldehyde.

The process EPA followed in reaching its decision on formaldehyde has been sharply criticized. EPA Administrator Gorsuch has acknowledged that the agency's approach reflected insensitivity to appearances.[560] Others have contended that EPA's conduct, which accorded preferential access to formaldehyde users and manufacturers, was unlawful. These claims smack of overstatement, but they cannot be discounted too quickly. One asserted ground of illegality is EPA's supposed violation of the prohibition against ex parte contacts. While EPA might have been constrained to avoid ex parte communications once it initiated rulemaking under section 4(f), *Home Box Office* is by its own terms limited to post-proposal communications.[561] An argument can be made, however, that section 4(f) presents a special case. EPA's decision not to regulate is final; it had a statutory responsibility to reach some decision within a specific period,[562] and Congress has explicitly authorized judicial review of decisions not to initiate rulemaking under section 4(f).[563] It is not far-fetched to argue that ex parte communications should be avoided, or at least documented and disclosed, in this context as well.

---

[555] *See* generally, T. Bartman, *Informal Meetings Between Agencies and Outside Groups* (unpublished manuscript based on interviews and EPA documents obtained pursuant to the Freedom of Information Act, May 17, 1982).

[556] 9 Pesticide and Toxic Chemical News 6 (No. 49, 1981).

[557] *See* Bartman, *supra*, at 4; Letter from Dr. John Hernandez, Deputy Administrator, to Congressman Toby Moffett, October 5, 1981.

[558] Memorandum from Dr. John A. Todhunter, Assistant Administrator for Pesticides and Toxic Substances, to Anne Gorsuch, EPA Administrator, February 10, 1982.

[559] *See* Bartman, *supra*, at 3.

[560] 9 Pesticide and Toxic Chemical News 6, No. 49 (1981).

[561] *Home Box Office, Inc.* v. *Federal Communications Comm'n*, 567 F.2d 9 (D.C. Cir. 1977).

[562] TSCA § 4(f), 15 U.S.C. § 2603(f) (1976).

EPA's second asserted breach of mandated procedures in its handling of formaldehyde is grounded on the Federal Advisory Committee Act (FACA),[564] which governs outside groups from which an agency seeks advice. The FACA requires formal chartering, advance notice of meetings, and, with exceptions not relevant here, public access to all committee sessions. None of these formalities was complied with by EPA. The courts have held the FACA applicable to many informal efforts by agencies to consult with private groups.[565] The D.C. Circuit has also made clear that it does not apply to meetings held at the request of private groups to make their position known to agency officials.[566] The historical record is ambiguous, concerning the initiative for and content of the meetings Dr. Hernandez held with the Formaldehyde Institute and CMA.

Even assuming that EPA officials violated no law in meeting privately with representatives of firms which made and used a substance under consideration for regulation, their conduct is still open to question. It leaves the distinct impression that EPA's decision not to regulate formaldehyde was the product of proceedings in which other interests had no opportunity to participate. EPA's failure for several weeks to provide any statement of reasons for its decision accentuated this impression. Equality of access to agency decisionmakers and the appearance of administrative integrity both warrant changes in EPA's approach.

The formaldehyde episode has not been selected to criticize EPA's new management. The kind of decision that EPA confronted arises frequently in agencies responsible for regulating environmental hazards: A new study, suggesting hazards previously unsuspected, precipitates internal review by agency scientists. If the study findings are reliable and disturbing, regulatory action may be appropriate; if they are not trustworthy or they are contradicted by better evidence, probably no action is required. An agency cannot follow a formal, highly structured process in making all such decisions, for they arise too frequently.[567] It must be able to rely on internal resources in deciding what issues are important enough to set in motion the statutory machinery for decisionmaking.

Furthermore, officials of an agency should not be precluded from meeting with persons interested in its decisions. Whether such meetings should always be public is debatable, although I think the better view is that any individual should be entitled to meeting privately with government officials. Recognition of such a ''right'' need not prejudice the public interest in knowing what officials are hearing, nor impair the opportunity of persons with opposing views to be heard. Two safeguards would protect both interests. First, an agency decisionmaker who agrees to meet privately with parties to a controversy should be willing to meet on the same terms with opposing parties. Second, the agency should insist that all written submissions by any party be available to the public and the decisionmaker should prepare, and release, a memorandum summarizing arguments made orally. This approach has been followed by FDA since the mid-1970's.[568]

---

[563] *Id.*

[564] Pub. L. No. 92-463, codified at 5 U.S.C. Appendix I (1976), as amended by Pub. L. No. 94-409, 90 Stat. 1247 (1976).

[565] *E.g., Food Chemical News* v. *Davis*, 378 F.Supp. 1048 (D.D.C. 1974).

[566] *Consumers Union* v. *Department of HEW*, 409 F.Supp. 473 (D.D.C. 1967), *aff'd without opinion*, 551 F.2d 466 (D.C. Cir. 1977).

[567] Regulatory agencies are constantly receiving reports of toxicological investigations, conducted by industry or reported in the scientific literature, about substances that potentially are subjects of regulation.

To be sure, this proposal goes beyond the specific requirements of the *Home Box Office* decision, for it would apply whether or not the agency had published a notice of proposed rulemaking. But the formaldehyde episode demonstrates that important issues are often resolved, and major interests affected, by decisions that do not result in public proceedings. Indeed, decisions by agencies not to initiate regulation of potentially hazardous chemicals may be as significant—for both human health and economic welfare—as decisions reached after formal public proceedings in which all affected interests have participated.

---

[568] FDA practice, for example, assures any citizen of the opportunity to request and obtain a private meeting with agency officials. A memorandum of any such meeting will be prepared by the agency officials present and made available for public inspection, with any trade secret or other legitimately confidential information deleted. High-ranking agency officials are required to maintain and disclose a calendar of all such meetings, including telephonic meetings, so that members of the public can be aware of their occurrence. *See* 21 C.F.R. Part B.

ADVICE ON OFFICIAL LIABILITY AND IMMUNITY

Thomas J. Madden and Nicholas W. Allard[*]*

- Summary
  - *Abstract*
  - *Recommendations*
    - I. Federal
    - II. State
- I. Introduction
  - *The Subject*
  - *The ACUS Mandate*
- II. Analytic framework
  - *Key Concepts*
  - *Competing Objectives, Core Values*
  - *Alternative Methods of Dealing With Governmental Wrongs*
- III. The Existing System of Dealing with Governmental Wrongs
  - *A. The Private Damage Action*
    - 1. Expansion of Individual Liability For Money Damages
      - —Judicially Discovered Rights—General Trends
      - —Section 1983 Actions
      - —Bivens Actions
      - —Litigation Costs— Attorneys' Fees
      - —Litigation Costs— Government's Defense of Officials
    - 2. The Immunity Doctrine
      - —Evolution of the Case Law
      - —The Case Law's Matrix of Issues
      - a. Source of Immunity
      - b. Degree of Immunity Available
      - c. Discretionary and Mandatory Action
      - d. Scope of the Defendant's Authority
      - e. Piercing the Immunity Defense
      - —An Evaluation
  - *B. Existing Forms of Public Enterprise Liability*
    - 1. Federal Enterprise Liability
      - —Insurance

---

[*] Thomas J. Madden and Nicholas W. Allard are attorneys at Kaye, Scholer, Fierman, Hays & Handler, Washington, D.C. This report was prepared with the assistance of Patrick R. Harkins and David H. Remes, also of that firm.

—Indemnification
—Direct Government or Enterprise Liability
2. State Enterprise Liability
C. *Administrative Controls Over Federal Officials*
1. Individual Sanctions
—Elected Officials
—Political Appointees
—Excepted Service
—Competitive Service
a. Reduction in Grade or Removal by the Agency for Unacceptable Performance
b. Disciplinary Sanctions Imposed By the Agency to "Promote the Efficiency of the Service"
D. *External Controls*
1. Impeachment
2. The Electorate
3. Congressional Control
4. Special Prosecutor
5. Public Pressure
The role of Administrative and External Controls in the Civil Sanction System
IV. Analysis: Changes at the Federal Level
A. *Summary of Issues Raised by Proposals to Establish Federal Enterprise Liability*
1. Proposed Legislation
a. H.R. 7034
b. S. 1775
2. Assessment of Issues Raised by H.R. 7034 and S. 1775
a. Retention of the "Good Faith" Defense
b. The Search for an Effective Substitute Deterrent
c. Jury Trial and "Additional" Damages
d. Attorney Fees
e. Torts of Former Officials
f. "Scope of Office" versus "Color of Law"
g. The Problematic Distinction Between Constitutional and Non-Constitutional Torts
B. *Recommendation*
V. Analysis: Changes at the State and Local Level
A. *Liability Under 42 U.S.C. § 1983*
1. Reprise
2. Problems Related to Federal Assistance
a. Rights and Obligations Under Section 1983
b. Remedies Under Section 1983
c. Increased Litigation
B. *State Responses to Section 1983 Liability*

C. The Congressional Response to Section 1983 Liability: Legislative Developments

D. A New Legislative Option

  1. Exhaustion
  2. Exceptions to Exhaustion
  3. Minimum Standards

E. Recommendation

Volume II: Appendices**

  Appendix A: Statutory Materials

  Appendix B: State Survey

  Appendix C: Annotated Survey of the Literature

** Some of the appendices for this report have not been published herein. They are the complete Appendix A: Statutory Materials and Appendix B: State Survey. These documents are stored in the project files of the Administrative Conference of the United States.

SUMMARY

Abstract

This study addresses the problems surrounding current rules governing official liability and immunity and evaluates alternative public policy responses to these problems. The focus of this study is the increasing vulnerability of executive branch officials at the federal, state and local levels to personal liability for money damages. The study concludes that the existing liability and immunity rules result in a civil sanction system that is not optimal, and recommendations are offered on desirable changes.

The recommendations of this study are based on a public policy analysis of official liability and immunity rules. The purpose is not to give advice on appropriate action under existing law or even to predict the course of legal developments. Rather, the objective is to identify the framework of the policy issues in this field and then to offer advice on changes that are worthwhile and feasible. The study also appraises the arguments commonly voiced in the ongoing debate over the subject of lawsuits against public officials. It examines relatively unexplored but important areas such as the role of administrative controls in a civil sanction system and the problem of dealing with governmental wrongs at the state and local levels. It is also intended that the comprehensive nature of this study, and the extensive materials compiled in the Appendices, will provide a useful tool in the continuing public examination of existing rules for official liability and immunity.

Although recognizing that existing liability and immunity rules have been developed and will inevitably continue to be significantly influenced by the courts, the study recommends a legislative response to the problems arising from governmental wrongs. Only legislation can produce a comprehensive and coherent change that addresses the complex legal, administrative, and social aspects of the problems. Legislation is also appropriate because of the need to accommodate the competing interests such as the desire for governmental accountability, the need to motivate government officials to engage in socially beneficial conduct, and the interest in minimizing government costs and inappropriate burdens on government officials. Moreover, the widespread interest in pending legislation before Congress and a significant amount of new state legislation demonstrate that the legislative forum will maximize public participation in revising the present civil sanction system.

RECOMMENDATIONS

I. Federal

Under current law, individual federal officials may be held personally liable for constitutional violations they are found to have committed while acting within the scope of their office or employment. Damages may not be recovered against the United States for violations of constitutional rights as such, although claims arising out of the same conduct may sometimes be stated against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680.

There is nearly universal agreement that the existing system of civil sanctions for constitutional violations by federal officials neither provides adequate assurance of compensation for victims of such violations, nor affords the degree of measured deterrence required to discourage improper conduct by government officials without discouraging proper conduct as well. In addition, the federal government often has interests at stake in constitutional tort litigation involving its officials which cannot adequately be represented by the individual officials themselves as defendants.

Recommendation

To serve the primary goals of compensation, deterrence, and fairness in dealing with constitutional torts committed by federal officials, and to afford a solution to the problems perceived to flow from the current system of individual liability, Congress should enact legislation providing that the United States shall be exclusively liable for damages for torts arising under the Constitution of the United States and committed by federal officials while acting within the scope of their office or employment.

Such legislation should provide:

(1) That, in constitutional tort actions, the United States may not assert as a defense the absolute or qualified immunity of the official whose conduct gave rise to the claim, or his reasonable good-faith belief in the lawfulness of his conduct. Such immunities, and the good-faith defense, have been judicially created for policy reasons to assure that exposure to personal liability shall not deter individual officials from the vigorous discharge of their responsibilities, and serve no purpose when the government is substituted as defendant other than to limit the extent to which genuine victims of constitutional injuries may secure redress. In providing that the United States shall not assert such immunities or the good-faith defense, Congress may wish to provide that the United States shall be permitted to assert any applicable immunities of the President, and, perhaps, of federal judges and members of Congress.

(2) That there shall be vested in an office of the Executive Branch independent authority to investigate constitutional tort cases in which there has been a judgment of liability against or money compromise by the United States, and that such office shall be vested with independent authority to conduct disciplinary proceedings in such cases as may be appropriate. Such a disciplinary mechanism is essential to perform the deterrent and corrective functions now served by the damage action remedy against individual government officials; existing administrative disciplinary mechanisms, by themselves, are neither directed toward nor capable of performing these functions under current law.

(a) One approach for implementing this recommendation would be to establish an Office of Disciplinary Counsel to investigate and, where appropriate, to prosecute official misconduct before an administrative tribunal independent of the agency that employed the offending official. Another approach would be to augment the existing authority and responsibilities of the Office of Special Counsel and the Merit Systems Protection Board under 5 U.S.C. §§ 1201–1209 to perform the functions described herein.

(b) If Congress should choose to rely on the Office of Special Counsel and the Merit Systems Protection Board to implement this recommendation, separate mechanisms would nevertheless be required to provide for independent investigation and disciplinary proceedings with respect to federal officials not subject to the jurisdiction of the Office of Special Counsel and the Merit Systems Protection Board.

(c) Notwithstanding the authority of the independent disciplinary mechanism utilized to implement this recommendation, the agency that employed the offending official would be responsible in the first instance for investigation and, where appropriate, for disciplining the official or implementing other corrective steps, and such action should not be postponed pending the outcome of any constitutional tort suit that may be filed against the United States. Congress should provide every federal agency with explicit statutory authority to employ existing administrative mechanisms for disciplining officials found to have violated constitutional rights.

(d) Before proceeding with disciplinary action against any official for a violation of constitutional rights, the Disciplinary Counsel or Special Counsel should determine whether the agency that employed the official has already taken disciplinary or other corrective action, and, if so, whether the agency's action is satisfactory from the standpoint of the system's overall goals of deterrence and accountability. The Disciplinary Counsel or Special Counsel would be authorized to initiate disciplinary proceedings before the Merit Systems Protection Board or other independent administrative tribunal only if he determined that the agency that employed the official had taken no disciplinary or other corrective action, or that the agency's action was insufficient. Any discipline later imposed by the Merit Systems Protection Board or other independent administrative tribunal would be reduced by any discipline imposed by the agency in its own proceedings.

(e) The Disciplinary Counsel or Special Counsel should be directed to compile and forward to the House and Senate Judiciary Committees periodic reports setting forth the cases he has reviewed, and explaining with particularity why he chose to proceed or not to proceed with independent disciplinary action in each case.

(3) That Congress should provide not only for actual damages but for reasonable liquidated damages in the event that actual damages are nominal or nonexistent because the injury caused by the violation of a constitutional right is of an intangible nature. Congress should also consider allowing "additional" damages against the United States in cases where the conduct giving rise to the tort was undertaken with the malicious intention to cause a deprivation of constitutional rights or with reckless disregard for the plaintiff's constitutional rights.

(4) That the right to jury trial should be retained for plaintiffs whose claims had arisen as of the effective date of the legislation implementing this

recommendation, and that Congress should consider extending the jury trial right to plaintiffs whose claims arose subsequent to the effective date of the legislation.

(5) That Congress consider the appropriateness of allowing attorney fees under such legislation in the context of a more comprehensive review of the attorney fee issue in across-the-board federal legislation.

(6) That legislation implementing this recommendation provide a mechanism for holding former government officials accountable for constitutional torts committed while they were in office, where a plaintiff has secured a judgment against or money compromise by the United States. Congress should consider allowing federal officials leaving government service to elect either to be sued individually for such torts, or to have the United States substituted in their place; and, in electing the latter, such officials would agree to submit to appropriate sanctions imposed by the agency for which they were employed when their tortious conduct occurred.

(7) That such legislation should provide for periodic review by the House and Senate Judiciary Committees of the operation of the legislation implementing the new system of federal enterprise liability and independent administrative sanctions.

II. State

The Supreme Court's expansion of the scope of 42 U.S.C. § 1983 to include claims based on alleged violations of federal statutory laws gives rise to the spectre of an increase in the number of section 1983 actions against state and local officials and municipalities involved with federal assistance programs. The continued devolution of responsibility for managing federal programs to the state and local levels is likely to add further to the rise in these types of section 1983 claims.

Although most states have some system to insulate government officials from personal liability under section 1983, increased litigation under that section is sure to have an adverse impact on state and local administration of federal assistance programs. To date, efforts to address the problem of expanded section 1983 liability have focused exclusively on amending section 1983 by deleting the phrase "and laws," thereby negating the effect of the Supreme Court's decision in *Maine v. Thiboutot*.

However, in light of the importance of section 1983 in the vindication of personal rights, amending that section is the least viable alternative for ameliorating the somewhat more discrete problem of derivative liability and increased litigation involving federal assistance programs. Instead, following the Supreme Court's decision in *Patsy v. Board of Regents of Florida* and the suggestions made by several of the Justices in that case, this recommendation calls upon Congress to consider legislation that would require the exhaustion of state administrative remedies as a prerequisite to bringing an action under 42 U.S.C. § 1983 for an alleged violation of the terms, conditions or rights created by a federal assistance program by any state or local official or political subdivision of a state.

The purpose of this recommendation is to avoid an increase in the number of claims likely to be filed under 42 U.S.C. § 1983 against state and local officials and municipalities involved in the administration of federal assistance programs, and to provide an alternative system for the resolution of such claims. In addition, this recommendation seeks to preserve existing remedies for the vindication of federal constitutional rights; provide an adequate, less costly and less time-consuming process for resolving disputes that arise out of federal assistance programs; encourage state and local governments to maximize managerial efficiency of programs and projects funded by federal assistance; ameliorate the adverse impact that section 1983 litigation would have on the successful operation of federal assistance programs by state and local entities and officials; and reduce the level of intervention by the federal judiciary in the administration of federal assistance programs. The recommendation set forth below should thus be applicable to all federal assistance programs benefiting state and local entities and third parties. Legislation to require exhaustion of state administrative remedies should contain the following general provisions:

(1) A third party or intended beneficiary of a federal assistance program would be required, prior to bringing an action under section 1983, to exhaust state administrative remedies which have been determined to be in substantial compliance with minimum standards promulgated by the federal agency having primary responsibility for the assistance program which forms the basis for the third party complaint or grievance.

State receipt of federal assistance would not be conditioned upon that state's agreeing to establish administrative remedies in compliance with minimum federal standards. Instead, state provision of adequate administrative remedies would be voluntary. However, the exhaustion requirement would only be applicable in those states where such remedies have been implemented.

(2) Claims based purely on alleged federal constitutional violations would not be subject to exhaustion in any case. In addition, a federal court would be authorized to grant interim relief in appropriate cases in accordance with federal rules of civil procedure, and would also be authorized to waive the exhaustion requirement in any case in which the court determines that exhaustion would be futile or the administrative remedy would be clearly inadequate.

(3) A federal agency having primary responsibility for the administration of federal assistance programs would promulgate—in consultation with state and local entities and interested persons and groups—minimum standards to guide states in establishing administrative procedures and remedies for third-party complaints relating to such programs. Such standards would be patterned after the following general statutory requirements: specific maximum time limits for replying to a grievance or claim filed by a party; specific maximum time limits in which the relief requested would either have to be granted or denied; priority processing of claims of an emergency nature, including those in which delay would endanger or create substantial risk of injury or damage to a person or group of persons; safeguards to ensure independent decision making within the state administrative process; de novo review in every case of state administrative determinations as to questions of fact and law; and, procedures for periodic

review of the continued adequacy of state administrative procedures, as well as complaints about the integrity or fairness of a state's procedures.

I. INTRODUCTION

The Subject

Immunity of the sovereign from liability for money damages in civil actions is among the most deeply rooted doctrines of our legal order. Mitigating the harsh consequences of denying compensation to victims of official misconduct under the sovereign immunity doctrine, a body of law has arisen permitting damage actions against officials where such misconduct is alleged. In addition, the sovereign immunity defense generally does not apply to municipalities and other units of local government charged with violations of federal law. Even in those instances where sovereign immunity has been waived or does not apply, liability for official misconduct may extend to not only the government, but also to the errant official.

The existing system of civil sanctions for official misconduct thus relies heavily on the recovery of damages from officials to accomplish the goal of compensating the victims of such misconduct. The possibility of such recovery, in turn, is largely relied upon to deter further official misconduct and to assure the wrongdoer's accountability to the victim and to society at large.

Notwithstanding the apparent logic of the existing system, most observers today agree that the system fails to serve two of its primary goals—measured deterrence of offical misconduct, and adequate compensation of the victims of such misconduct. On the one hand, the ever-present threat of damage suits is widely believed to deter not only improper conduct by officials, but proper conduct as well. On the other hand, there is general recognition that private damage actions against individual officials do not afford the victims of official misconduct financially responsible defendants. A further concern, at the local level, is the potentially crippling effect of large civil damage awards against municipalities in a period of recession and retrenchment.

In recent years, the impetus for change of the civil sanction system has grown. This trend is fueled by the modern expansion of governmental activity that can give rise to allegations of harm, by the explosion of judicially recognized causes of action that can give rise to official liability as well as by judicial constriction of the umbrella of official immunity. Literally thousands of lawsuits are pending in which the issue of official immunity is critical. For ten years Congress has considered legislation that would revamp the existing law governing the liability of federal officials for actions taken in the course of their official duties.[1] At the state and local levels of government there are tremendously varied responses to increasingly acute problems of official liability.[2]

---

[1] *See infra* Chapter IV and legislative material compiled in Appendix A.

[2] *See infra* Chapter V and State Survey compiled in Appendix B.

Inevitably, however, the debate over legislative alternatives to the existing system has been bedeviled by seemingly incompatible political considerations. Many government officials contend that the real problem to be addressed is not how to deter official misconduct or to compensate its victims, but rather how to free civil servants from the debilitating threat of civil damage actions, and municipal governments from the crushing burden of civil liability. Civil liberties groups and others, by contrast, focus on the importance of deterrence and accountability, and on the need to assure adequate compensation for the victims of government misconduct. Reconciliation of these competing concerns has thus far proved a most formidable challenge.

Adding to the complications created by political disagreements among those favoring reform is the vastness and intricacy of the subject. The burgeoning literature devoted to the topic of sovereign immunity and official liability attests to the intense concern for the subject among scholars.[3] Recent Supreme Court cases alone involve the immunity of executive branch officials ranging from the President[4] and his closest advisors[5] to middle- and lower-level career civil servants,[6] members of the armed forces,[7] legislative officials including members of Congress,[8] and quasi-judicial officers like federal prosecutors[9] and administrative law judges,[10] and finally, state and local officials in all branches of government.[11]

Moreover, fundamental questions about the ideal scope of government involvement in everyday life, and about the proper allocation of power between the federal government and the states, bear directly on proposed alternatives to the existing system of sovereign immunity and official liability. Indeed, it has been noted that the problems this study will address cannot be readily resolved: "The answers turn in part upon empirical data that are unavailable. They concern fundamental values about which there is little social agreement."[12]

The ACUS Mandate

The Administrative Conference of the United States (ACUS) has initiated and sponsored this project in order to obtain comprehensive analysis and advice on the law of official liability and immunity.[13] In executing the ACUS mandate, this project has been focused in a number of significant ways. First, consistent with ACUS' mandate and for practical reasons, it is worthwhile for this project to concentrate on the subject of executive rather than judicial or legislative immunity. The law of judicial immunity, although provocative, is relatively straightforward.[14] Legislative immunity similarly is a less fertile area for this

---

[3] *See infra* Annotated Survey of the Literature compiled in Appendix C.

[4] Nixon v. Fitzgerald, 102 S. Ct. 2690 (1981).

[5] Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982); Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd by an equally divided court,* 101 S. Ct. 3132 (1981).

[6] Velde v. National Black Police Ass'n., Inc., 631 F.2d 784 (D.C. Cir. 1980), *remanded in light of* Harlow, *supra* note 5 102 S. Ct. 3503 (1982).

[7] United States v. Brown, 348 U.S. 110 (1954); *see also* Coffey v. United States, 324 F. Supp. 1087 (S.D. Cal. 1971).

[8] Hutchinson v. Proxmire, 443 U.S. 111 (1979). *See also* Benford v. ABC, Inc., 502 F. Supp. 1148 (D. Md. 1980).

[9] Imbler v. Pachtman, 424 U.S. 409 (1976).

[10] Butz v. Economou, 438 U.S. 478 (1978).

[11] *E.g.* Owen v. City of Independence, 445 U.S. 622 (1980); Maine v. Thiboutot, 448 U.S. 1 (1980); Maher v. Gagne, 448 U.S. 122 (1980).

[12] Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages,* 1980 S. Ct. Rev. 281, 282.

---

[13] The research contract with ACUS describes the project as follows:

> The Contractor shall conduct a study, prepare a report, and shall draft proposed recommendations on the subject of government officials' personal liability for violations of the Constitution and civil rights laws arising out of actions taken in the course of official business.
>
> The contract describes the scope of the work under the project as follows:
>
> The Contractor, in the course of preparing the report and recommendations shall:
>
> (1) Briefly summarize the background of the problem, relevant case law, legal analyses and other articles.
>
> (2) Analyze the relative costs and benefits of the existing liability system.
>
> (3) Evaluate relevant proposals for legislation, including, without limitation, bills that would substitute the U.S. for the official, immunize the official, create administrative disciplinary systems, expand the Federal Tort Claims Act, and modify 42 U.S.C. § 1983.
>
> (4) Examine special problems facing particular groups of officials, including state and local employees or others involved with federal grant or revenue sharing programs, law enforcement officials, and high-level supervisory personnel, and recommend solutions.
>
> (5) Examine significant procedural questions that are likely to arise under the current system including, without limitation, choice of state or federal forum, governmental reimbursement of officials' judgments and attorneys' fees, rules governing punitive damage awards, utility of 'preemptive' declaratory judgment suits, pleading and burden of proof issues, and recommend useful approaches to resolving them.
>
> The Contractor shall also participate in such meetings of the Conference, its committees, its Council, and the Chairman's staff as may be required by the Office of the Chairman, for consideration of the study and report that are the subject of this contract and resulting proposals, including plenary sessions and other meetings taking place after submission of and payment for the final report as provided herein. The Contractor shall cooperate with the staff of the Office of the Chairman as necessary and appropriate for the completion of this contract.

[14] Note the outrageous judicial conduct that was immunized by Stump v. Sparkman, 435 U.S. 349 (1978). The Court reversed the seventh circuit which had denied immunity for a judge who approved (on the day it was filed) a mother's petition to have her daughter sterilized. (There was no arguable statutory basis for entertaining the sterilization petition, the hearing was *ex parte*, the only grounds for the order was the mother's uncorroborated statement that her 15-year old daughter was "somewhat retarded" and associated with young men, and there was no notice or possibility of appeal afforded to the girl (the girl, told she needed an appendectomy, was operated upon shortly after approval of the petition).) *See also*, Pierson v. Ray, 386 U.S. 547 (1967).

As Justice Rehnquist sarcastically noted about judicial immunity:

> If one were to hazard an informed guess as to why such a distinction in treatment between judges and prosecutors, on the one hand, and other public officials on the other, obtains, mine would be that those who decide the common law know through personal experience the sort of pressures that might exist for such decision makers in the absence of absolute immunity, but may not know or may have forgotten that similar pressures exist in the case of nonjudicial public officials to whom difficult decisions are committed. But the cynical among us might not unreasonably feel that this is simply another unfortunate example of

project to explore. Legislative immunity for Congressmen derives, of course, from the Speech or Debate Clause of Article I of the United States Constitution[15] and case law affords comparable immunity for state and local legislators.[16]

Another refinement to this project that is appropriate in light of the ACUS mandate is to consider the ramifications of official immunity at the state and local level, but only insofar as the potential liability flows from federal assistance programs. Even this, in itself, is an appropriate subject for a separate research project.[17]

It is probably impossible to formulate rules sufficiently general for use in appraising existing or proposed substitute mechanisms for the control and deterrence of official misconduct in the myriad of circumstances in which it may occur. Account must be taken of the unique issues raised in the many disparate contexts involved—from that of the cop on the beat, to that of the state social worker, the federal program manager, and the President of the United States. Any search for a simple solution to the problem in all of its contexts is sure to be disappointed.

With these limitations in mind, the Authors hope that this study will avoid undue abstraction while attending to those complexities of the subject that have consistently eluded recognition. This project aims not only to suggest areas in which future study would be worthwhile, but to offer recommendations for such change as may clearly be warranted today. The starting point will be to describe the analytic framework of the study.

> judges treating those who are not part of the judicial machinery as 'lesser breeds without the law.'

Butz v. Economou, 438 U.S. 478, 528 n."*" (1978) (Rehnquist, J., concurring in part and dissenting in part, joined by Burger, C. J., Stewart, J., and Stevens, J.). *But see* Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980); Lopez v. Vanderwater, 620 F.2d 1229 (7th Cir. 1980).

[15] Hutchinson v. Proxmire, 443 U.S. 111 (1979); United States v. Helstoski, 442 U.S. 477 (1979); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972); Powell v. McCormack, 395 U.S. 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169 (1966); Tenney v. Brandhove, 341 U.S. 367 (1951); Kilbourn v. Thompson, 103 U.S. 168 (1881).

In recent years, the Court has restricted the availability of Speech or Debate Clause immunity. The Court has refused to find legislators immune unless the challenged activity can be shown to have been not merely related to legislative activities but essential to the deliberations of the legislature. *See* Hutchinson v. Proxmire, 443 U.S. 111, 130–33 (1979); *see also* Davis v. Passman, 442 U.S. 228 (1979); Gravel v. United States, 408 U.S. 606 (1972); Cass, *Damage Suits Against Public Officers*, 129 U. Pa. L. Rev. 1110, 1131 n.96 (1981). And one very recent decision is of great concern to Congressional staff members. Benford v. ABC, Inc., *supra* note 8.

[16] Tenney v. Brandhove, 341 U.S. 367 (1951); Lake Country Estate, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979).

[17] *See generally*, Madden & Harkins, *New Block Grant Programs Face Period of Adjustment in the Courts*, Nat. L.J., Mar. 8, 1982, at 29; Groszyk & Madden, *Managing Without Immunity: The Challenge for State and Local Government Officials in the 80's*, Pub. Ad. Rev. (March/April 1981); Peters, *Municipal Liability After Owen v. City of Independence and Maine v. Thiboutot*, 13 Urb. Law. 407 (1981); Freilich, *1979–1980 Annual Review of Local Gov't Law: Municipal Liability and Other Uncertainties*, 12 Urb. Law. 557 (1980).

II. ANALYTIC FRAMEWORK

An appreciation of the complexity of the subject may be gleaned from the works of Schuck[1] and Cass,[2] among others.[3] Their analysis has revealed the extent of the underbrush, and provides a useful point of departure for this study. An essential first step is to sketch the conceptual framework distilled, for the purposes of this study, from the case law and literature.

Key Concepts

The terms ''official immunity'' and ''official liability'' are used to refer to the personal immunity and liability of government officials[4] in civil damage actions brought against officials in their individual capacities for actions taken in the course of employment or, in some cases, under color of office or law. The terms, correctly applied, do not embrace lawsuits arising from conduct ordinarily unrelated to the official's performance of his governmental duties, or where no action under color of office or law is involved. An obvious example of such conduct is a car accident involving a vacationing government official that leads to a suit seeking damages for the official's negligent driving. Claims of this sort have nothing whatsoever to do with any government function or purported exercise of legal authority.[5] The terms ''official immunity'' and ''official liability'' also do not apply to causes of action for injunctive relief, which are deemed to be ultimately directed toward the government rather than to the individual holding an official position.

The term ''governmental immunity'' refers to the doctrine of sovereign immunity. In the context of this report, the term ''governmental liability'' applies to situations in which the government has waived sovereign immunity and is derivatively liable for the conduct of officials. Treating the government responsibility as analogous to that of the employer under the doctrine of *respondeat superior* is, of course, only one way to look at the matter. Equally valid is the notion that the government's responsibility is not *derivative* but *ultimate*.[6]

---

[1] Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 S. Ct. Rev. 281. Professor Schuck's book on this subject is forthcoming in 1983. *See also Federal Tort Claims Act: Hearing on S. 1775 Before the Agency Administration Subcommittee of the Senate Judiciary Committee (Pt. 2)*, 97th Cong., 2d Sess. (1982) (testimony of Peter H. Schuck).

[2] Cass, *Damage Suits Against Public Officers*, 129 U. Pa. L. Rev. 1110 (1981).

[3] *E.g., Civil Liability of Government Officials*, 42 Law & Contemp. Probs. 1 (winter 1978), *see especially* 8 (Mashaw), 46 (Baxter), and 62 (Epstein).

[4] As used in this report, the term ''government official'' encompasses officials, employees, and all kinds of executive branch personnel.

[5] The question of when certain very high ranking officials such as the Secretary of State or the Attorney General are ever completely ''off-duty'' is an interesting but relatively minor issue for the purposes of this study.

[6] A key issue to be considered in determining the extent of governmental liability for individual misconduct is whether such liability should arise only when the alleged misconduct has been committed by a government official acting within the scope of his office or employment, or whether such liability should attach to misconduct committed by any person allegedly acting under color of office or law as well. *See* Comment, *Constitutional Tort Remedies: A Proposed Amendment to the Federal Tort Claims Act*, 12 Conn. L. Rev. 492, 535–36 (1980).

The term "governmental wrongs" is used to refer to harm inflicted by government officials within the scope of their office or employment, or by persons acting under color of office or law, that causes a legally cognizable injury. This term is also necessarily imprecise, for there are any number of possible classifications of governmental wrongs.[7] When a distinction is intended between constitutional and other legal harms this will be noted.

This project's focus on the executive official at the federal, state, and local level is also broad. At each level of government, there are many instances in which the distinction blurs between executive, legislative, and judicial officials. And, moreover, there are numerous types of executive officials. As will be shown, the differences among the various kinds of officials—elected officials, political appointees, civil service or career government employees, members of the armed forces, officials with direct public contact such as law enforcement officers, and social workers, and of course, former officials of all kinds—may be critical with respect to the immunity issue.[8] For example, it may be useful to determine whether the incidence of litigation falls disproportionately on any particular type of official. And, of course, understanding the function and characteristics of particular officials is crucial for analyzing how various components of an alternative system of civil sanctions will affect their behavior.

Competing Objectives, Core Values

An appraisal of alternative systems for dealing with governmental wrongs involves a balancing of societal interests and values. These interests may be viewed from the perspectives of the victim, the official, and the public.

For the victim, there are the immediate objectives of compensation and retribution, and the longer-range goal of deterrence. Fundamental principles of justice demand assurances of compensation or redress adequate to make the victim whole for wrongs suffered as a result of official misconduct. The objective of retribution, referred to by some as accountability and by others as punishment, is recognized as an independent interest of the victim. Indeed, it is this objective which may dominate the decision to sue officials when there is little prospect of recovering damages.

From the official's perspective, the matter essentially is one of fairness to himself and his colleagues. Most government officials are dedicated, hardworking, and well-intentioned, often making sacrifices in pay and other benefits to serve the public. From this standpoint, it is thought to be unfair to punish or impose sanctions on an individual carrying out his responsibilities as a government official, or to subject that individual to the threat of personal damage actions, simply by virtue of holding an official position and attempting to carry out governmental responsibilities.

---

[7] *See, e.g.*, Mashaw, *supra* note 3, at 10–14; Cass, *supra* note 2, at 1139–41.

[8] *See* Schuck, *supra* note 1, at 293–95. It is beyond the scope of this study to examine in depth such special cases as the military, *see, e.g.*, H.R. 3799, 97th Cong., 1st Sess. (1981), and federal public defenders, *see, e.g.*, H.R. 3060, 97th Cong., 1st Sess. (April 7, 1981). *See Tort Claims: Hearings on H.R. 24, H.R. 3060, and H.R. 3799 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 97th Cong., 1st Sess. (1981). *See* Comment, *Constitutional Tort Remedies: A Proposed Amendment to the Federal Tort Claims Act, supra*, note 6, at 511–25.

The public interest demands that an official who violates legal standards be held to account. For, as Justice Brandeis observed long ago:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the omnipresent teacher. For good or for ill, it teaches the whole people by its example.[9]

The very legitimacy of our system is ill-served when government officials are not held accountable for their misconduct. Indeed, in a nation deeply suspicious of government power and imbued with the conviction that no person is above the law, the social interest of discerning and penalizing abuses of governmental power is a transcendent one.[10]

Legitimacy also involves the question of how and who is to set immunity rules and to administer them. For example, it may not be deemed legitimate to involve the judiciary to decide cases where they are required to second-guess executive policy decisions. And officials, however agreeable to the concept of accountability, may nevertheless deeply resent citizen review of official actions.[11]

Fairness is also essential to the public interest in coping with government wrongs. An individual official should be able to discern whether or not his activity is within standards that will be deemed to be acceptable. In the absence of clear guidelines, or if behavioral guidelines are routinely changed and applied retroactively, it would be considered unfair to the official to impose sanctions for, without more, failure to anticipate the applicable standard of conduct—even if, at the same time, it seemed fair to afford the injured party redress.

Still another aspect of fairness from a systemic standpoint is whether there is a risk of sanctions being imposed on the official erroneously—either when the official has not actually violated a standard of conduct, or when the sanction is in some sense in excess of what would be deemed just under the circumstances.

The public interest is also served by the overriding objective of achieving effective and responsible government. Thus, official liability systems ought to deter wrongdoing by officials, without discouraging officials from executing their duties in a decisive, selfless, and socially beneficial manner. The possibility that liability for one sort of official error could induce other errors in the opposite direction—a phenomena sometimes referred to as "overdeterrence"—has received exhaustive attention from the courts in particular.[12] Concern about the problem of overdeterrence has, in fact, been the mainstay rationale for the absolute immunity of certain officials.[13]

---

[9] Olmstead v. United States, 277 U.S. 438, 485 (1928) (dissenting opinion).

[10] Mashaw, *supra* note 3. *See also* Vaughn, *The Personal Accountability of Public Employees*, 25 Am. U.L. Rev. 85 (1975).

[11] *See, e.g.*, Schuck, *supra* note 1, at 363–64 (discussion of police reaction to civilian review boards).

[12] *See* Cass, *supra* note 2, at 1153. *See* Spalding v. Vilas, 161 U.S. 483, 498 (1896); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

There are numerous alternative formulations of the relevant objectives to be found in the literature and the case law. However, the general statement provided above will serve for the purposes of this study to provide a touchstone for appraisal of alternative systems of coping with governmental wrongs. That is, the existing civil sanction system and feasible alternatives will be evaluated in terms of whether they serve these objectives and values.

There is no formal calculus for this task. It is well recognized that the interests and values related to official immunity often collide with one another. And the necessary tradeoffs may well involve comparing "apples and oranges." Any estimation of the preferred method of the optimal civil sanction system inescapably involves difficult judgments.

Alternative Methods of Dealing With Governmental Wrongs

This study evaluates four categories of methods of dealing with governmental wrongs. The present civil sanctions system relies to varying extent on a combination of all four types of responses.

First, of course, is the private action seeking damages from individuals for violations of constitutional or other rights. This is the approach defined earlier as "official liability" and is presently the principal means for responding to governmental wrongs.

Another approach for affording redress for such injuries is the private action seeking damages from the government itself. Viewed as a means by which society as a whole bears the cost of the transgressions of its public servants, this approach .can be referred to as "enterprise liability," a term borrowed from tort law, where it is traditionally related to private enterprise, but is now generally applied to government enterprises as well. Under such a system, liability is imposed upon the entity best suited, by reason of size, insurability and control, to minimize the cost of official wrongs.[14] Although at all levels of government there have been partial waivers of sovereign immunity, enterprise liability is not available for the redress of a large class of governmental wrongs such as constitutional torts.

The form of enterprise liability on which this report will focus is one in which the government is required to make direct payment once the fact of wrongdoing has been established. Government responsibility for such costs of litigation as attorneys' fees and damages are components of enterprise liability.

---

[13] Nixon v. Fitzgerald, 102 S. Ct. 2690, 2703 (1982) (the President); Stump v. Sparkman, 435 U.S. 349, 356–64 (1978) (judges); Tenney v. Brandhove, 341 U.S. 367, 377–78 (1951) (legislators).

[14] *See, e.g.*, Schuck, *supra* note 1, at 288.

Alternative forms of enterprise liability that will be discussed are insurance[15] and indemnity[16] systems.

For the purpose of compensating victims, enterprise liability has an advantage over official liability: the governmental "enterprise" is much more likely than the individual officer to have the funds required to satisfy a judgment.[17] This, however, could not be the only advantage of a system of enterprise liability. Enterprise liability can tend to decrease the overdeterrence or "chill" placed on the vigorous decisionmaking process of a government official who is afraid to act because of the overhanging threat of personal damage actions.

Two problems arise, however, when the governmental "enterprise" is required to satisfy judgments. First, the potential for *under*deterrence exists where the threat of personal liability no longer confronts governmental officials. Whereas the threat of individual liability induce officials to modify their behavior, enterprise liability, by contrast, only indirectly encourages officials to modify their behavior; largely to the extent that *other* officials, through a system of administrative controls, choose to require.[18]

A third important category of responses to governmental wrongs may be referred to as internal administrative controls. This category includes mechanisms of control within the executive branch: *i.e.*, a wide range of inducements to good behavior and sanctions for bad behavior including job termination or transfer, promotion or demotion, and changes in pay and perquisites.

Needless to say, the array of internal incentives and sanctions comprising the administrative system of control, like the other alternatives, serves some goals more effectively and others less effectively. For example, although disciplinary proceedings focus on the acts of a particular official, and may serve a deterrent or retributive function, they do not, standing alone, afford compensation to the victims of governmental wrongdoing. Moreover, these devices may also make it possible for agency heads to shift responsibility for misconduct from their own policies to the poor judgment or wrongdoing of an individual selected to serve as a scapegoat.

A most significant characteristic of existing administrative methods of controlling governmental wrongdoing is that, unlike private damage actions against officials or the government, disciplinary sanctions generally cannot be instituted by the victim. In the current system, injured individuals must rely on others to initiate such actions. Though they may complain, petition, or use publicity to urge that disciplinary action be taken, they cannot themselves compel the initiation of internal administrative control procedures, or act as parties thereto.

---

[15] Insurance is a form of loss shifting in which the government shares the risk of loss with a third party, the insurer.

[16] Indemnification involves government liability in private damage actions where the individual official is a nominal defendant.

[17] Cass, *supra* note 2, at 1174.

[18] *Id*. at 1175.

The final type of response amounts to a variety of external controls that originate outside the executive branch. These controls include not only judicial review of official action but also legislative oversight—up to and including the remedy of impeachment—as well as the expression of public sentiment by means of the ballot. In contrast to administrative controls, external controls are less certain and clearly defined, and often depend heavily upon the level of publicity regarding official misconduct. Although, by themselves, legislative, judicial, or electoral controls are unlikely to prove an effective response to official misconduct, the symbiotic interplay of such external controls with the other instruments of the civil sanction system must be considered in appraising needed modifications.

Having painted the foregoing schematic in broad strokes, a portrait of the existing civil sanction system may be clearer.

III. The Existing System of Dealing with Governmental Wrongs

An understanding of the present civil sanction system is essential. The first section below describes the private suit for damages in terms of both liability and immunity of officials. The following sections describe the extent that the current civil sanction system involves alternative methods of responding to governmental wrongs: *i.e.*, enterprise liability, administrative disciplinary controls, and finally, external controls.

A. *The Private Damage Action*

1. *Expansion of Individual Liability For Money Damages*

The last decade has witnessed a significant expansion in the vulnerability of executive branch officials at the federal, state and local levels to personal liability for money damages. A number of factors have led to the greatly increased number of actions brought against government officials during this time. A most significant factor that hardly requires elaboration is the extraordinary growth of government. Simply put, expanded government operation coincides with a higher incidence of harmful official action of all kinds—both real and perceived—that generates suits alleging a variety of legal wrongs. Here it will be assumed that the scope of government is a given variable.

Other contributing factors merit consideration. In general, the well-recognized trend towards an expansion in judicially-discovered rights results in increased claims alleging violation of constitutional rights. The broadening of the section 1983 action, as well as the recognition and expansion of the direct *Bivens* action also play major roles in this expansion of zones of potential individual liability for money damages. In addition, the recently increased ability to recoup court costs and attorneys' fees in section 1983 actions has provided an incentive for plaintiffs to bring actions against executive officials at the state and local level. Finally, the broadened availability of information about government activities through channels such as the Freedom of Information Act has made it easier to establish the factual predicate for litigation against officials. Some of the most significant influences on the evolving nature of the private damage action against officials are briefly reviewed below.

—Judicially Discovered Rights—General Trends

During the early 1970's, the Supreme Court greatly widened the procedural due process rights designed to protect the individual against government infringement.[1] The Court created new "property" and "liberty" rights in recognition of citizens' growing reliance on government for benefits and other entitlements.[2] In doing so, the old distinction between privileges and rights was rejected. As Professor Tribe has written, "[f]or the first time, the Court recognized as entitlements interests founded neither on constitutional nor on common-law claims of right but on a state-fostered (and hence justifiable) expectation."[3] For example, the Court recognized an individual's property right to welfare benefits once welfare assistance has been initiated (thus the benefits cannot be terminated without a hearing),[4] and a prisoner's liberty interest in parole once an early release is promised.[5] The Court also recognized a property interest in government employment where continued employment is promised expressly or through implication.[6]

---

[1] For a discussion of this judicial expansion of recognized rights, *see, e.g.*, L. Tribe, *American Constitutional Law* § 10-9 (1978).

[2] Charles Reich's article, *The New Property*, 73 Yale L.J. 733 (1964) played a significant role in recognizing the increased dependence of many citizens upon the state.

Furthermore, the early 1970's saw an expansion in what some describe as the "core" procedural due process interests, as well as the creation of the new entitlements. Thus, under some circumstances, the government must meet due process requirements before maligning a person's good name or reputation.[7] The Court also built a type of privacy interest into the core property interest by enabling people to be secure against seizure of their personal belongings by the state or another party with state approval.[8] In the latter half of the 1970's, the Court reversed this liberalizing trend and began to narrow the individual's liberty and property rights protected by procedural due process.[9] These rights, however, certainly remain far greater than they did a decade ago.

—Section 1983 Actions[10]

In addition to the increase in judicially discovered rights, the courts in recent years have eased the requirements for plaintiffs bringing damage suits based on those rights. In the last two decades, the number of actions brought against state and local government officials under 42 U.S.C. § 1983 has increased nearly one hundred-fold.[11] That provision, enacted in the Civil Rights Act of 1871, provides for liability in a civil action for any person who under color of law deprives another person of "any rights, privileges or immunities secured by the Constitution and laws."

Several recent decisions have increased the vulnerability of state and local government officials to suits brought under section 1983. For example, in *Maine v. Thiboutot*,[12] the Supreme Court held that the phrase "and laws" in that provision refers to all federal statutes, and not just those pertaining to civil rights. This broad interpretation will undoubtedly increase the number of section 1983 suits filed against state and local government officials for violations of federally guaranteed rights.[13]

---

[3] Tribe, *supra* note 1, at 515.

[4] Goldberg v. Kelly, 397 U.S. 254 (1970).

[5] Morrissey v. Brewer, 408 U.S. 471 (1972). The same entitlement interest in probation was recognized in Gagnon v. Scarpelli, 411 U.S. 778 (1973).

[6] *See* Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

[7] Wisconsin v. Constantineau, 400 U.S. 433 (1971).

[8] Tribe, *supra* note 1, at 520.

[9] *See id.*, §§ 10–11.

[10] An expanded analysis of the section 1983 case law, with an emphasis on liability under federal asssistance, is contained in Chapter V.

[11] In 1979, there were nearly 25,000 filings in federal courts, as compared to 261 in 1961. Groszyk & Madden, *Managing Without Immunity: The Challenge for State and Local Government Officials in the 1980's*, Pub. Admin. Rev. (March/April 1981).

[12] 448 U.S. 1 (1980).

Other recent decisions open the door to more suits against government officials. In *Parratt v. Taylor*,[14] decided in 1981, the Court decided that section 1983 is not limited to intentional deprivations of constitutional rights. One year later, the Court held that a plaintiff is not required to exhaust state administrative remedies prior to the filing of a section 1983 action.[15]

The trend toward increased section 1983 litigation could be slowed if, in the wake of *Harlow v. Fitzgerald*,[16] discussed below, it becomes easier for state and local officials to establish a good-faith defense. But this result is hardly inevitable. And notwithstanding *Harlow*, the defendant official would probably maintain the burden of pleading his good-faith defense.[17] In most circuits the defendant official also bears the burden of persuasion.[18]

—Bivens Actions

In addition to the expansion of liability for money damages for state and local officials under section 1983, the number and types of actions against federal officials has also greatly increased in the decade since the Supreme Court's 1971 decision in *Bivens v. Six Unknown Named Agents*.[19] In *Bivens*, the Supreme Court held that a plaintiff may bring an action for money damages against a federal official who violates his Fourth Amendment rights. Despite the lack of any statutory cause of action, the court expressly found in *Bivens* that a cause of action may be premised upon a violation of the Constitution.

The number of direct "*Bivens* actions" brought has increased dramatically, with law enforcement and prison officials as the most frequent defendants.[20]

---

[13] In his dissent, Justice Powell stated "[n]o one can predict the extent to which litigation arising from today's decision will harass state and local officials; nor can one foresee the number of new filings in our already overburdened courts. But no one can doubt that these consequences will be substantial." *Id.* at 23. Federal statutes will not automatically allow a plaintiff to sue under section 1983, however—the courts now must determine whether the statute secures rights which can be litigated in section 1983 claims. The Supreme Court has recently held that where "the remedial devices in a particular act are sufficiently comprehensive, they may suffice to demonstrate a congressional intent to preclude the remedy of suits under § 1983." Middlesex County Sewage Authority v. National Sea Clammers Associations, 453 U.S. 1, 20 (1981).

[14] 101 S. Ct. 1908 (1981).

[15] Patsy v. Board of Regents, 102 S. Ct. 2557 (1982).

[16] 102 S. Ct. 2727 (1982).

[17] *See* Gomez v. Toledo, 446 U.S. 635 (1980).

[18] *See* Cass, *Official Liability: Damage Suits Against Public Officers*, 129 U. Pa. L. Rev. 1110, 1129 n.90 (1981) (cases collected).

[19] 403 U.S. 388 (1971).

[20] *See, e.g., Federal Tort Claims Act: Hearings on S. 1775 Before the Subcommittee on Agency Administration of the Senate Committee on the Judiciary (Pt. 1)*, 97th Cong., 1st Sess. 4 (1981) (testimony of Deputy Attorney General Edward C. Schmults). Cass reports nearly a fivefold increase in the legal actions filed by prisoners alleging violations of constitutional guarantee in the decade from 1970 to 1980. Cass, *supra* note 18, at 1159. (Based on figures of the Administrative Office of the United States Courts).

One reason for the proliferation of direct actions for violations of constitutional rights has been the courts' expansion of the so-called *Bivens* action. Although the Supreme Court restricted its holding in *Bivens* to the fourth amendment's guarantee against unreasonable searches and seizures, some lower federal courts have since extended the theory to the first, fifth, sixth, eighth, ninth, tenth, thirteenth and fourteenth amendments.[21] In *Davis v. Passman*,[22] the Supreme Court held that a *Bivens* action may be brought directly on the due process clause of the fifth amendment. The Court, citing *Bivens*, reasoned that a damages remedy was appropriate and that there was no congressional declaration that money damages should not be awarded.[23]

In addition, the Supreme Court held in *Carlson v. Green* that a *Bivens* remedy is available even where an alternative remedy against the federal government under the Federal Tort Claims Act (FTCA) is available.[24] The Court reasoned that four advantages of the *Bivens* action indicated that Congress did not intend to limit a plaintiff to the FTCA remedy. First, it concluded that since the *Bivens* remedy is recoverable against individuals, it serves as a more effective deterrent than the FTCA remedy against the federal government. Second, punitive damages may be awarded in a *Bivens* suit but are statutorily prohibited in a FTCA suit. Third, a plaintiff cannot opt for a jury trial in a FTCA action. Finally, an action under the FTCA exists only if the state in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward.[25]

Some courts have also applied *Bivens* in suits alleging unconstitutional conduct by state officials, despite the availability of alternative remedies such as section 1983, and other courts, going even further, have allowed *Bivens* actions against private individuals or entities.[26]

—Litigation Costs—Attorneys' Fees

It is widely recognized that the willingness to litigate claims against government officials is also related to the amount and incidence of the cost of litigation.[27] The proliferation of section 1983 actions against state and local government officials is partially explained by the availability of attorneys' fees for successful plaintiffs. In 1976, Congress passed the Civil Rights Attorneys' Fees Awards Act of 1976, thereby authorizing courts to award attorneys' fees to the prevailing party in actions to enforce the terms of the Civil Rights Act of 1866, which includes section 1983.[28] Moreover, in *Maher v. Gagne*,[29] the 1980 companion case to *Thiboutot*, the Supreme Court held that this attorneys' fees provision applies to all types of section 1983 actions, and not just to those based on a violation of the Constitution or a federal statute providing for the protection of civil rights. In that same case, the Court also decided that a plaintiff may be awarded attorneys' fees even if he prevails through a settlement rather than through litigation.[30]

---

[21] *See, e.g.*, Lehmann, *Bivens and its Progeny: the Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 Hastings Const. L.Q. 531, 566–72 (1977); note, *Bivens and the Creation of a Cause of Action for Money Damages Arising Directly From the Due Process Clauses*, 29 Emory L.J. 231 (1980).

[22] 442 U.S. 228 (1979).

[23] *Id*. at 245–47.

[24] 446 U.S. 14 (1980). The basic provisions of the Federal Tort Claims Act appear in 28 U.S.C. § §1346(b), 2671–2680.

[25] 446 U.S. at 20–23. Following *Bivens*, the FTCA was amended to waive sovereign immunity and allow suits against the federal government arising out of assault, battery, false arrest, false imprisonment, malicious prosecution, and abuse of process committed by law enforcement officers. 28 U.S.C. § 2680(h). *See* Boger, Gitenstein, & Vertvil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C.L. Rev. 497 (1976) (reprinting excerpts from legislative history).

[26] See Lehmann, *supra* note 21, at 575–87.

Under the so-called ''American Rule,'' such awards are not recoverable in *Bivens* actions. The FTCA does not provide for fees and costs.

—Litigation Costs—Government's Defense of Officials

When a federal official is sued for actions taken within the scope of his official duty, he will ordinarily be represented by Justice Department attorneys, at government expense.[31] This is also generally the case throughout the states. This representation of federal employees will usually be provided regardless of whether the suit is brought in state or federal court, as long as the official is not the target of a federal criminal investigation concerning those actions. The official must make his request for representation to his superior in the agency in which he works. The agency will then forward the request to the Justice Department, along with a statement of whether the employee was acting within the scope of his employment.[32]

In addition to the exception for officials subject to a federal criminal investigation, the Justice Department will not defend an official in two other situations: when a vigorous defense will conflict with other interests of the United States, or when the defenses of several defendant officials in the action are inconsistent. In such cases, the Justice Department will retain private counsel for the official at public expense.[33]

---

[27] It seems desire for retribution or harrassment motivates suits independently of the likely amount of a damage award or the cost of litigation. It is assumed that litigants are no angrier now than they ever have been and thus that this factor does not explain the increased amount of damage actions against officials.

[28] Codified at 42 U.S.C. § 1988 (1976). Successful defendants may also be reimbursed, but the standards are much more stringent than for plaintiffs. *See* Cass, *supra* note 18, at 1155 n. 70. *See generally*, Witt, *The Civil Rights Attorneys' Fees Awards Act of 1976*, 13 Urb. Law. 589 (1981).

[29] 448 U.S. 122 (1980).

[30] *Id. See also* Tatro v. Texas, 516 F. Supp. 968 (N.D. Tex. 1981).

[31] Certain plaintiffs are able to obtain low cost legal aid or pro bono representation. However, officials have probably greater access to relatively free defense counsel in most cases.

[32] United States Department of Justice, Monograph, Damage Suits Against Federal Officials; Department of Justice Representations Immunity 11 (Revised, November 1981). *See also* 28 C.F.R. §§ 50.15, 50.16 (1981); United States Attorneys' Manual, Title 4, ¶¶ 4-13.000, 13.300 *et seq.*

For state and local officials sued in their individual capacity under section 1983, state or local law will govern the availability of public counsel (or public payment) for the defense. A majority of states do provide for public defense if the actions upon which the suit is based were taken within the scope of the officials' employment.[34]

2. *The Immunity Doctrine*

—Evolution of the Case Law

Tracing the development of the immunity doctrine reveals that the courts have used federal, state, and local precedents interchangeably, and even a cursory analysis of the evolution of the case law also demonstrates the difficulties encountered by the judiciary in wrestling with the public policy issues in this field.

The doctrine of official immunity, which some contend is an essential underpinning to our form of government, did not reach its zenith until the mid-twentieth century.[35] Professor Mashaw explains:

> Early opinions made no distinction between public officers and ordinary citizens in determining liability for tortious conduct. Indeed, many early decisions imposed liability for official acts that were not even tortious by private-law standards [*E.g.*, *Miller v. Horton*, 152 Mass. 540, 26 N.E. 100 (1891) (Holmes, J.)].
>
> . . . Nineteenth century decisions often afforded public officers little protection against liability even for actions taken in the performance of their official duties.[36]

A departure from this early pattern was anticipated by the 1872 case of *Bradley v. Fisher*,[37] where the Supreme Court established absolute immunity for judges acting in their judicial capacity, so long as there was subject matter jurisdiction.[38] Even malicious or corrupt motives would not subject a judge to liability.[39] In providing this broad cloak of immunity, the Court stressed the importance of absolute judicial freedom:

---

[33] *See* Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 Harv. J. on Legis. 1, 8–9 (1979). Between 1976 and 1979, the Justice Department retained approximately 75 private firms for such representation, pursuant to 28 C.F.R. § 50.16, at a cost in excess of $2 million. *Id.* Critics of the controversial private counsel program maintain that it is costly, extends the duration of cases, and makes them more difficult to settle. *Id.*

[34] *See infra* Chapter V and Appendix B.

[35] A provocative and interesting colloquy on the antecedents and symbiotic development of sovereign immunity and official immunity is reprinted at 42 Law & Contemp. Prob. 82–89 (Winter 1978).

[36] Mashaw, *Civil Liability of Government Officials*, 42 Law & Contemp. Prob. 1 Part II, at 14–15, n.3. In a quote from Engdahl, *Immunity and Accountability for Public Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 47 (1972), Mashaw notes "[t]hese standards of personal official liability were repeatedly reaffirmed and applied during the same decade around the turn of the century when the Supreme Court was enlarging the immunity of the state; indeed it was only for this reason that the expanding state immunity was considered to be consistent with the tradition of effective redress for positive governmental wrongs."

[37] 80 U.S. (13 Wall.) 335 (1872).

> [I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.[40]

Subsequently, high-level executive officers were also deemed entitled to absolute immunity from civil suit, where their alleged wrongful acts were committed in the course of the discharge of their duties. In *Spalding v. Vilas*,[41] the Supreme Court reasoned that the public policy considerations which exempt judges from civil liability also apply to the heads of executive departments. As in *Bradley*, the Court recognized "a distinction between action taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision."[42]

This broad protection from liability received an additional extension from the often quoted decision by Judge Learned Hand in *Gregoire v. Biddle*,[43] decided over 50 years after *Spalding*. Not only did the Court hold that the officials' alleged maliciousness would not, if proven, subject them to liability, but Judge Hand also apparently eliminated the distinction for officials acting without legal authority.[44] Furthermore, *Biddle* broadened the doctrine of absolute immunity for heads of executive departments to cover mid-level executive officials (in

---

[38] The Court distinguished cases in which there clearly was no jurisdiction. In the latter case, "any authority exercised is usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible." *Id.* at 352. Thus, the judge would be subject to civil liability. *Cf.* Stump v. Sparkman, 435 U.S. 349 (1978).

[39] 80 U.S. (13 Wall.) at 352.

[40] *Id.* at 347. This absolute protection for the judicial officers from liability in civil suits remains today, despite the evolution of only a qualified immunity for executive officers. Critics have maintained that no legitimate reason exists for this distinction, except perhaps the willingness on the part of judges to be more protective of themselves than of others who bear similar responsibilities and pressures. *E.g.*, Butz v. Economou, 438 U.S. 478, 528 n. "*" (1978), *quoted supra* Chapter I, note 14. At this time, absolute immunity is also available to judicial officers like prosecutors, legislators, and the President of the United States. *See* Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982).

[41] 161 U.S. 483 (1896).

[42] *Id.* at 498.

[43] 177 F.2d 579 (2d Cir. 1949).

[44] Hand asserted, "[w]hat is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him." *Id.* at 581.

Biddle, the Director of the Enemy Alien Control Unit of the Justice Department and a district director of Immigration were accused of false arrest and imprisonment).

The Supreme Court explicitly extended this protection from civil liability to lower-level executive officers in *Barr v. Matteo*.[45] The Court stated:

> We do not think that the principle announced in *Vilas* can properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.
>
> To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted. . . .[46]

Thus, since the director of the Office of Rent Stabilization acted "within the outer perimeter of [his] line of duty"[47] in allegedly libeling his employees, he was protected by absolute immunity.

This immunity from liability was held to apply to local government officials. In its 1967 decision in *Pierson v. Ray*,[48] the Supreme Court addressed the question of the liability of a judge and police officers who allegedly, under color of state law, infringed the plaintiff's federally guaranteed rights. The plaintiff joined his section 1983 suit with an action for false arrest and imprisonment. In addition to finding that the judge was immune from prosecution,[49] the Court held that section 1983 did not remove the police officers' defense of good faith and probable cause which they could assert in the common-law action for false arrest and imprisonment. They could therefore claim the same immunity for the section 1983 count as they could for the state law count.[50]

The enormous change in the area of official immunity during the past decade began in the 1974 landmark case of *Scheuer v. Rhodes*.[51] There, the estates of the students killed at the demonstration at Kent State University brought a section 1983 action against the Governor of Ohio, the university president, and various officers and enlisted members of the Ohio National Guard.[52] The Court decided that only a limited or qualified good-faith immunity applies to both officers of the executive branch of government. In elaborating on this new standard, the Court stated:

---

[45] 360 U.S. 564 (1959).

[46] *Id.* at 572–73 (footnotes omitted) (Justice Harlan, writing for a plurality of four).

[47] *Id.* at 575.

[48] 386 U.S. 547 (1967).

[49] The Court cited Bradley v. Fisher, *supra* note 37, in so holding.

[50] 386 U.S. at 555–57.

[51] 416 U.S. 232 (1974).

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.[53]

By affording the state officials the absolute immunity recognized in previous decisions, "§ 1983 would be drained of meaning," the Court reasoned.[54]

In the eight years since *Scheuer*, the Court continued to whittle away the immunity from civil suits for executive officials. In *Wood v. Strickland*,[55] the Court decided that the immunity standard contains elements of both an objective and a subjective good-faith test. Thus, a school official would not be protected simply on the basis of his good intentions. Instead, the standard would also be based on "knowledge of the basic, unquestioned constitutional rights of his charges."[56] If a school official knew or reasonably should have known that his actions violated a student's rights, or if he acted maliciously, he would be subject to liability. The Court announced the same standard for superintendents of state hospitals in *O'Connor v. Donaldson*[57] and for prison officials in *Procunier v. Navarette*.[58]

Despite the narrowing of the exemption for executive officials, however, prosecutors remain absolutely immune for actions taken in initiating and pursuing a criminal prosecution. This complete protection from liability for actions taken within the scope of prosecutorial duties has been described as a form of "quasi-judicial" immunity which was consistently recognized at common law.[59] In *Imbler v. Pachtman*,[60] the Supreme Court held that this absolute immunity also exists in section 1983 suits. In addition, agency officials who perform functions analogous to those of a prosecutor are entitled to absolute immunity.[61]

---

[52] The plaintiffs charged that these officials, acting under color of state law, "intentionally, recklessly, willfully and wantonly" caused an unprecedented National Guard deployment on the campus and ordered the Guard members to perform allegedly illegal acts resulting in the students' deaths. *Id.* at 235.

[53] *Id.* at 247–48.

[54] *Id.* at 248.

[55] 420 U.S. 320 (1975) (§ 1983 action brought by students against school officials, charging infringement of due process under color of state law for expulsion from school).

[56] *Id.* at 322.

[57] 422 U.S. 563 (1975).

[58] 434 U.S. 555 (1978).

[59] *See, e.g.*, Tyler v. Witkowksi, 511 F.2d 449 (7th Cir. 1975); Kostal v. Stoner, 292 F.2d 492 (10th Cir. 1961), *cert. denied*, 369 U.S. 868 (1962).

[60] 424 U.S. 419 (1976). Legislators and judges also retain their absolute immunity. Absolute immunity has been extended to legislative aides as well. Gravel v. United States, 408 U.S. 606 (1972).

During the past several terms, the Court has addressed the issues of what type of immunity should be granted to high federal executive officials, and to the President himself. Federal cabinet officials, including officers, are only to be awarded the *Scheuer* qualified good-faith immunity, the Court decided in *Butz v. Economou.*[62]

In *Economou*, the plaintiff filed an action against a number of officials in the Department of Agriculture and other federal agencies, including the Secretary of Agriculture, alleging that they had instituted an investigation and administrative proceedings against him for his criticism of the Department. The defendants asserted that, as federal officials, they were entitled to absolute immunity for all discretionary acts within the scope of their authority. In rejecting this argument and extending the *Scheuer* holding to cover federal officers, Justice White wrote for the majority:

> [I]n the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983. The constitutional injuries made actionable by § 1983 are of no greater magnitude than those for which federal officials may be responsible. The pressures and uncertainties facing decisionmakers in state government are little if at all different from those affecting federal officials. . . . Surely, *federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers [emphasis in the original].[63]

The Court in *Economou* also refused to recognize absolute immunity for cabinet officers, severely limiting its 1896 holding in *Spalding v. Vilas.*[64] Justice White, in addition to stating that our system of jurisprudence rests on the assumption that all individuals are subject to federal law, reasoned that "the greater power of such officials affords a greater potential for a regime of lawless conduct."[65] But the Court left open the possibility that absolute immunity might be granted to certain officials exercising discretionary authority, where such protection is essential for the proper functioning of government.[66]

In the recent case of *Nixon v. Fitzgerald*,[67] however, a sharply divided (5–4) Court held that the President is entitled to absolute immunity. Justice Powell, writing for the majority, considered Presidential immunity "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history."[68] This shield from civil liability extends for all acts within the "outer perimeter" of the President's official responsibility.[69] Despite a vigorous dissent, the Court reasoned that alternative remedies for protection against Presidential misconduct are available, such as impeachment, scrutiny by the press, and oversight by Congress.[70]

---

[61] Butz v. Economou, 438 U.S. 478 (1978).

[62] *Id.* Four justices dissented on this point.

[63] *Id.* at 500–601.

[64] The dissent criticized the majority's "unnaturally constrained reading" of *Spalding* and stated that "*Spalding* clearly and inescapably stands for the proposition that high-ranking executive officials acting within the outer limits of their authority are absolutely immune from suit." *Id.* at 518, 519.

[65] *Id.* at 506.

[66] *Id.* at 507.

[67] 102 S. Ct. 2690 (1982). In Kissinger v. Halperin, 452 U.S. 713 (1981), an equally divided Court failed to decide the issue.

In *Harlow v. Fitzgerald*,[71] the companion case to *Nixon v. Fitzgerald*, the Court refused to extend this absolute immunity to high-ranking White House officials. The Court rejected the officials' reliance on *Gravel v. United States*,[72] where the immunity for legislators was extended to cover their aides. Relying on *Economou*, the Court stated that such a derivative immunity for Presidential aides would sweep too wide and could not be reconciled with its "functional" approach to immunity law.[73] The Court did leave open the possibility that "[f]or aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest."[74] Generally, however, only a qualified, good-faith immunity will apply.

Most importantly, the subjective and objective analysis called for the test for this good-faith immunity was altered from that outlined in *Wood v. Strickland*. Concerned that judicial inquiry into subjective motivation may be disruptive of effective government, the Court decided that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery."[75] Thus, the Court removed the subjective element from the good-faith defense. The Court stated:

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time

---

[68] 102 S. Ct. at 2701. The Court added, "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 2703.

[69] *Id.* at 2705. The President's reorganization of the Air Force, in which plaintiff was dimissed from his job (he alleged it was in retaliation for testimony before Congress on military cost-overruns), was "well within" this outer perimeter. *Id.*

[70] *Id.* at 2705–06.

[71] 102 S. Ct. 2727 (1982). The action alleged that the two close aides of President Nixon, Bryce Harlow and Alexander Butterfield, conspired with the President to unlawfully discharge Fitzgerald.

[72] 408 U.S. 606 (1972).

[73] 102 S. Ct. at 2734–35.

[74] *Id.*

[75] *Id.* at 2738.

> was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.[76]

The most recent case on governmental immunity to reach the Supreme Court was remanded for further consideration in light of this decision.[77]

—*The Case Law's Matrix of Issues*

The foregoing essentially chronological description of the case law can be usefully complimented by a review organized according to the most significant immunity law issues. Any analysis of the matrix of issues presented by the case law on the immunity doctrine will inevitably be less than crystal clear, as the decisions in this area have not been very consistent, especially in recent years.

a. Source of Immunity

In determining the degree of immunity to be granted to various government officials, the courts have looked to a number of sources for guidance. The paramount consideration has been that of public policy—what degree of immunity will best serve societal interests—but the courts have not always considered all of the competing policy considerations and they have examined other factors as well. For example, with regard to judicial immunity, the Supreme Court considered the English common-law rule, as well as policy considerations.[78] In determining the appropriateness of a similar blanket immunity for federal legislators, the Court found, of course, the shield from liability to be rooted in the Speech or Debate Clause of the Constitution.[79] And the scope of Presidential immunity was considered by Justice Powell to be "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history,"[80] and was justifiable on policy grounds. The vigorous dissent by Justice White, on the other hand, in strongly rejecting the constitutional underpinnings of the decision characterized the majority decision as "almost wholly a policy choice [and] a choice that is without substantial support."[81]

---

[76] *Id.* at 2739.

[77] Velde v. National Black Police Ass'n., 102 S. Ct. 3503 (1982). This case is particularly significant in that it involves the immunity issue in the context of § 1983 actions involving federal grants. *See infra* Chapter V, §A.

[78] Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347–49 (1872). The purported necessity of absolute judicial freedom was the paramount consideration of the Court, however.

[79] U.S. Const. art. I, § 6, cl. 1. The Court has held that "legislators engaged 'in the sphere of legitimate legislative activity' . . . should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." Dombrowski v. Eastland, 387 U.S. 82, 85 (1967); *see also* Kilbourn v. Thompson, 103 U.S., 168, 204 (1881).

[80] Nixon v. Fitzgerald, 102 S. Ct. 2690, 2701 (1982).

For lower executive officials, the Court's so-called "functional" approach has been based, in part, on public policy grounds. The most important of the grounds favoring immunity is the fear that broad liability to suit will deter officials from principled and forceful decisionmaking[82] and the belief that such broad liability for officials who must exercise discretion is unjust.[83] Balanced against these considerations is the need for a remedy for those who have been wrongly injured, and the policy of deterring government officials from carelessly or intentionally taking actions that will infringe citizens' rights.

b. Degree of Immunity Available

There are generally two basic categories of immunity to be provided for government officials—absolute and qualified good-faith immunity. Absolute immunity is available to judges,[84] federal legislators,[85] prosecutors,[86] and the President.[87] In addition, legislative aides are covered by this blanket protection,[88] as are agency officials who perform functions analogous to those of a prosecutor or judge.[89] The grant of absolute immunity does not mean that these officials may never be sued for money damages. For example, a judge is not immune from suit when he has injured someone in a case where the court clearly has no jurisdiction,[90] and a federal legislator is only protected for actions taken "in the sphere of legitimate legislative activity."[91] Similarly, the President receives absolute immunity only for actions taken within the outer perimeter of his official responsibility.[92]

For executive officials other than the President, prosecutors, and those who perform analogous functions to those of a prosecutor or judge, only qualified immunity is available as a defense to a suit for money damages. Even this qualified defense may be available only for discretionary actions. As the Court explained in *Scheuer v. Rhodes*, the degree of immunity varies depending upon "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.''[93] This qualified good-faith defense applies to local, state and federal executive officials. It is applicable to governors,[94] Cabinet officials,[95] and presidential aides,[96] as well as to lower-ranking officials. The Court has left open the possibility that certain high-ranking federal officials may be entitled to absolute immunity if public policy would require such a blanket protection.[97] But these officials would bear the burden of showing that public policy requires a grant of absolute immunity for them.[98]

---

[81] *Id.* at 2712.

[82] *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 319–20 (1975); Pierson v. Ray, 386 U.S. 547, 554 (1967).

[83] *See, e.g.*, Scheuer v. Rhodes, *supra* note 51, at 240.

[84] *See* Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872).

[85] *See* Dombrowski v. Eastland, *supra* note 79; Kilbourn v. Thompson, *supra* note 79.

[86] *See* Imbler v. Pachtman, 424 U.S. 409 (1976); Tyler v. Witkowski, 511 F.2d 449 (7th Cir. 1975).

[87] Nixon v. Fitzgerald, *supra* note 67.

[88] Gravel v. United States, 408 U.S. 478 (1978).

[89] *See, e.g.*, Butz v. Economou, 438 U.S. 478 (1978).

[90] Bradley v. Fisher, *supra* note 84.

[91] Dombrowski v. Eastland, *supra* note 79, at 85.

[92] Nixon v. Fitzgerald, *supra* note 67.

c. *Discretionary and Mandatory Action*

The Court has indicated in its decisions over the past twenty-five years that officials with greater discretionary authority are to be protected to a greater degree by the immunity defense than those exercising less discretion in their actions. This result, it has been noted, is perverse in that it is officials who exercise the least amount of discretionary authority who are most prone to damage actions and may be the most likely to react to the risk of suit by performing their duties in a manner designed to avoid suit rather than promote the public interest,[99] as the Court stated in *Barr v. Matteo*:

> To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion it entails.[100]

In *Scheuer v. Rhodes*, the Court, in granting a qualified immunity for both the governor of a state and lower executive officials, decided that ''the variation [in immunity is] dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.''[101] In its remand, the Court directed the district court to determine whether the officers acted within the range of discretion permitted for the holders of these offices; it also indicated that the governor's office would permit the exercise of more discretion than would be the case for lower officers.[102]

---

[93] 416 U.S. at 247.

[94] *Id.* at 247–48.

[95] Butz v. Economou, *supra* note 61.

[96] Harlow v. Fitzgerald, *supra* note 71.

[97] For example, the Court indicated, ''[f]or aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest.'' *Id.* at 2735.

[98] *Id.* at 2735–36. *See also* Butz v. Economou, *supra* note 61.

[99] Schuck, *Suing our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 S. Ct. Rev. 281, 293–95, 299–300.

[100] 360 U.S. 564, 573 (1959). The defendant, the acting director of the Office of Rent Stabilization, exercised discretion in his duties.

[101] 416 U.S. 232, 247 (1974).

[102] *Id.* at 250. The Court stated, ''[i]n short, since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad.'' *Id.* at 247.

In *Butz v. Economou*,[103] the Court rejected absolute immunity for Cabinet officials, despite its recognition that such high officials are required to constantly exercise their discretion. Balanced against the need to protect officials who are required to exercise discretion was the Court's fear that "the greater power of such officials affords a greater potential for a regime of lawless conduct."[104] Thus, only qualified immunity was appropriate. These same considerations were reiterated in awarding only a qualified immunity to high White House officials, who also must exercise their discretion in day-to-day decisionmaking.[105]

Where an official performs no discretionary functions and engages only in ministerial duties, the law is well-settled that no immunity exists for torts committed. This concept has been the common law and has remained virtually unchanged over the years. The greater question lies in determining what functions are discretionary.[106]

d. Scope of the Defendant's Authority

Another issue is whether a defendant official has acted within the scope of his authority. Where he has acted within that scope, the official is protected by whatever type of immunity is applicable—otherwise, he is not. Perhaps the wide variety of situations in which the immunity defense can be raised has inhibited the Court from articulating rules of general applicability and the cases are often remanded for a determination of that factual issue.[107]

The standard for the determination has been phrased in various ways, such as "within the outer perimeter of [the official's] line of duty,"[108] and "acts performed in the course of official conduct."[109] In the few cases where the Supreme Court has made this factual determination, the accompanying analysis and discussion have not been very helpful. For example, in holding that the acting director of the Office of Rent Stabilization acted within the scope of his authority in stating in a press release that he planned to suspend certain employees for conduct for which the agency had been criticized, the Court merely stated that it would be "an unduly restrictive view of the scope of the duties of a policy-making executive official to hold that a public statement of agency policy in respect to matters of wide public interest and concern is not action in the line of duty." The Court added that the fact that the official was not required by law or by his superiors to make the statement was not a factor to be considered, since he was of policy-making rank, acting at a level of government where the concept of duty encompasses the sound exercise of discretionary authority.[110]

---

[103] 438 U.S. 478 (1978).

[104] *Id*. at 506.

[105] Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982).

[106] K. Davis, *Administrative Law Treatise* §§ 26.15–16 (Supp. 1982).

[107] *See, e.g.*, Scheuer v. Rhodes, *supra* note 51, at 502.

[108] Barr v. Matteo, *supra* note 45, at 575.

[109] Scheuer v. Rhodes, *supra* note 51, at 248.

[110] Barr v. Matteo, *supra* note 45, at 575.

Similarly, President Nixon was considered to be acting within the outer perimeter of the duties of his office in ordering a departmental reorganization in the Air Force, in which the job of the plaintiff (who had testified before Congress on military cost-overruns) was eliminated. In so ruling, the Court only stated that finding otherwise would subject the President to trial on numerous allegations, and would deprive the absolute immunity of its intended effect.[111] Thus, in those few cases where the Supreme Court has addressed the question of the scope of a defendant official's authority, it has allowed a broad scope for officials that must exercise discretion.[112]

e. Piercing the Immunity Defense

As discussed above, neither an absolute nor a qualified immunity is available to a defendant official where the actions which form the basis of the suit were not within the outer perimeter of the official's authority. Thus, such a threshold demonstration by the plaintiff could preclude the immunity defense. However, this is often hard to accomplish. With very high officials such as the President, it may be almost impossible to argue that a particular action was not within the outer reach of the scope of their office.[113]

The qualified good-faith immunity is an affirmative defense that must be pleaded by a defendant official not entitled to absolute immunity.[114] By demonstrating that the official did not have a good-faith belief that he was not violating the plaintiff's rights, the plaintiff may successfully attack this defense. Previously, this good-faith test contained both objective and subjective elements,[115] but in its 1982 decision in *Harlow v. Fitzgerald*, the Supreme Court decided that inquiries into whether a defendant official acted with a malicious intention only served to protect insubstantial claims from summary judgment. It therefore eliminated this subjective element from the test. Now only a showing that the official "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff]" will pierce the qualified immunity defense.[116]

Furthermore, the defense will not fail if the law upon which the plaintiff relies was not clearly established at the time the official acted. In this circumstance, the Court reasoned, the official could not fairly be said to "know" that the law forbade the actions which he took. But if the law was clearly established, the defense will ordinarily fail; only a showing by the official that he neither knew nor should have known of the relevant legal standard will allow his defense to be sustained.[117]

---

[111] Nixon v. Fitzgerald, *supra* note 67, at 2705.

[112] A related issue is whether official immunity should be available for action under color of official title. *See infra* Chapter IV, § B.

[113] In Nixon v. Fitzgerald, for example, it was argued without success that the alleged misconduct by the President involved illegal interference with a congressional witness which was outside the scope of the President's authority. *See, e.g.*, Brief *Amicus Curiae* of Senator Orrin G. Hatch, et al. at 20, Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982).

[114] Gomez v. Toledo, 446 U.S. 635, 640 (1980).

[115] Wood v. Strickland, *supra* note 55, at 322.

[116] Harlow v. Fitzgerald, *supra* note 71, at 2737 (emphasis in the original).

It remains to be seen, however, whether the new good-faith standard will have the intended effect of facilitating the early dismissal of suits. It may be, for example, that the so-called objective test contains in many cases subjective issues. The realm of other difficult issues that could frustrate early dispositions is as vast as the ingenuity of counsel.

—An Evaluation

The case law establishes a confusing and often unsatisfactory array of rules for official liability and immunity. There is virtually no evidence that these rules accomplish the social objectives they are purported to advance such as compensation, deterrence and encouraging desirable official conduct.

But the judicial process, by its very nature is ill-suited to make the type of comprehensive policy decisions that many believe are needed in this area.[118] The courts depend on individual cases which arise serendipitously, and they are decided one by one, rather than in a cohesive manner most conducive to general policy. Moreover, courts are often hampered and insulated from the acquisition of the type of factual record that would inform broad policy choices.

Criticism of the courts' liability and immunity rules comes easily in such circumstances. But the courts are only filling vacuums not grabbing turf. It seems obvious that initiatives for changing the present civil sanction system's primary reliance on the private damage action must come from the legislative arena with a strong assist from the executive branch. One commentor suggests that this process, now well underway, is actually promoted by the difficulties created by the case law:

> [T]he [Supreme] Court's approach can be sensibly viewed as a heroic effort to fashion a just system of incentives and deterrents in the face of chronic legislative inaction. The Court, in this view, has fashioned a respectable legal artifact given the crudeness of the tools available to it. Moreover, by magnifying the anomalies of this ineffective and often unjust system, the Court's effort could stimulate a rationalization and strengthening of that system.[119]

B. Existing Forms of Public Enterprise Liability

In response to the increased threat of personal liability caused by the several factors discussed above, various attempts have been made at all levels of government to shift this risk elsewhere.[120] The following sections will consider several of the existing arrangements for shifting damages from personal liability to governmental or enterprise liability at the federal and state levels, including:

---

[117] *Id.* at 2739.

[118] *See infra* Chapters IV and V.

[119] Schuck, *supra* note 99, at 286–87 (footnotes omitted).

[120] *See infra* Chapters IV and V, and Appendix B.

(1) liability insurance for the individual official, (2) governmental indemnification of the official, and (3) direct liability of the governmental enterprise for the actions of its employees.

1. *Federal Enterprise Liability*[121]

—Insurance

One method available for shifting the risk of liability away from the individual official is the utilization of liability insurance.[122] In the private sector individuals frequently make use of liability insurance to avoid large financial losses caused by accidents, fire, theft, etc. Government employees could also utilize liability insurance to protect against the risk of a large adverse judgment. The employee could purchase such insurance individually or be covered instead by a group program purchased by his employer. By paying a premium to an insurance company, the risk of liability is shared with the third-party insurer.[123] The individual employee is thus freer to operate without the threat of personal liability hanging over his head.

Federal law generally does not authorize the purchase of insurance against the personal liability of officials.[124] One reason for this limited use of insurance as a means of shifting liability to the enterprise is that such a program might be contrary to public policy because it reduces the deterrent value of a personal judgment against the government official.[125] To the extent that insurance is effective, it may so fully reduce the incentive to avoid liability-producing activity that underdeterrence becomes a problem.[126]

---

[121] There are three forms of enterprise liability. Under a system of liability insurance the insurer receives premium payments and pays the plaintiff for loss. Under a system of indemnification, the enterprise reimburses the individual defendant who pays off the plaintiff. In contrast, under a system direct enterprise liability, the government itself would pay the plaintiff directly.

[122] Mashaw, *supra* note 36, at 8.

[123] A federal agency usually will decide to assume the risk of its own liability thereby acting, in effect, as a self-insurer. According to Federal Procurement Regulations:

> Ordinarily, it is the policy of the Government not to insure its own risks. In the absence of specific statutory authority for the payment of insurance premiums, appropriated moneys of the United States generally are not regarded as available for that purpose.

41 C.F.R. §1–10.301 (1981). The Comptroller General has stated:

> It is the established policy of the Government to be a self-insurer of its own risks of loss on the theory that size of the Government resources permits it to do so. . . . Comp. Gen. Dec. B-168106, 74-2 CPD ¶3 (1974).

[124] There are limited areas where the Government will purchase insurance which would cover negligence for which its employees would be otherwise personally liable. These include insuring the risk of loss for the first one hundred dollars of property damage in auto accidents involving rented cars, and also damage for rented aircraft, and rented buses. *See* Comp. Gen. Dec. B-168106, 74-2 CPD ¶3 (1974). Certain medical personnel obtain liability insurance. *See, e.g.*, 42 U.S.C. §§ 2458a and 2458b. Such insurance may be distinguished from indemnification of federal officials which is available on a limited basis. Federal officials have difficulty purchasing liability insurance on their own. *See*, *Amendments to the Federal Tort Claims Act: Hearings before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 96th Cong., 1st Sess. 88 (1979) (statement of Ordway Burden, Law Enforcement Assistance Foundation).

[125] See *Schuck, supra* note 99, at 332 and n.179; Cass, *Damage Suits Against Public Officers*, 129 U. Pa. L. Rev. 1110, 1160–64 (1981).

A second reason for the limited reliance on insurance is the costs associated with dealing with an intermediary (the insurance company) which would not exist in a system of direct enterprise liability.[127]

—Indemnification

Another method of shifting the risk of liability away from the individual official is indemnification. Under a statutory system of indemnification, the government itself would be required to pay any adverse judgment suffered by the individual official, including the cost of defending the action. At the present time, there is no general statutory provisions for indemnification of federal employees, even where the liability clearly arose within the scope of their employment.[128]

The major reason why indemnification is not frequently used as a substitute for personal liability is the potential for a conflict of interest between the defendant enterprise and the defendant employee. For example, a defendant employee may defend a tort action by claiming that the enterprise was solely responsible for the alleged tortious conduct. In such a situation, the enterprise would, in effect, reimburse the employee for the employee's efforts to place liability on the enterprise. Another reason why indemnification is not widely used is that it results in the same form and amount of compensation as direct enterprise liability, but involves an extra step in paying out a claim and the extra administrative costs that go along with that step. Finally, indemnification does not eliminate the necessity for officials to participate in and defend lawsuits.

—Direct Government or Enterprise Liability

Prior to the enactment of the Federal Tort Claims Act (FTCA), damage suits against the United States arising from common-law torts were generally barred by sovereign immunity.[129] Created in England and developed in the United States, sovereign immunity stands for the proposition that the sovereign cannot be sued without its consent.[130] The doctrine of sovereign immunity has no explicit constitutional or statutory basis. Rather, it emerged as a result of judge-made law.[131] Chief Justice Marshall, in *Cohens v. Virginia* stated:

---

[126] Cass, *supra* note 125, at 1160. Proponents of enterprise liability claim that such a system is necessary to overcome the problem of overdeterrence.

[127] As the Comptroller General explains: "Self insurance [by the Government] will affect in a survey of those items of cost and profit that would normally be included in the premiums charged by private insurers." Comp. Gen. Dec. *supra* note 123.

[128] Schuck, *supra* note 99, at 333; *Hearings on S. 1775 Before the Subcommittee on Agency Administration of the Senate Committee on the Judiciary*, 97th Cong. 1st Sess. (1981) (statement of Edward C. Schmults). Schuck reports that there are only two exceptions in which indemnification is specifically authorized by statute: "for actions based on 'anything done' in enforcement of the Internal Revenue Code (26 U.S.C. § 7423) and for malpractice suits against medical personnel of several named agencies (*See* 10 U.S.C. § 1089(f), 22 U.S.C. § 817(f), 38 U.S.C. § 4116(e), and 42 U.S.C. §§ 233(f) and 2458a(b))." Schuck, *supra* note 99, at 333 n.180.

[129] Comment, *Scope of the Discretionary Function Exception Under the Federal Tort Claims Act*, 67 Geo. L.J. 879, 882 (1979).

[130] Basso v. United States, 239 U.S. 602 (1916).

> "The universally received opinion is, that no suit can be commenced or prosecuted against the United States. . . ."[132]

Because of the sovereign immunity bar, one of the only remedies available to an individual tortiously aggrieved by an agent of the government was a "private bill" from Congress allowing recovery against the United States government.[133] The growing number and burden of private bills[134] and mounting hostility to sovereign immunity eventually led Congress to pass the FTCA and thus create a simplified recovery procedure for those injured by governmental negligence. The FTCA waived the United States' immunity from suit for claims arising out of the "negligent" or "wrongful" conduct of government employees acting "within the scope of employment." 28 U.S.C. § 1346(b) (1976) provides:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Later amendments to the FTCA also waived the United States' immunity in suits arising from the "intentional torts" of its employees, such as assault, battery, false imprisonment, false arrest, abuse of process and malicious prosecution when committed by federal investigative or law enforcement officers.[135]

The FTCA as it currently reads, however, leaves the immunity of the United States government intact in several important areas. First, the government cannot be held liable for the performance or non-performance of a discretionary function or duty. 28 U.S.C. § 2680 provides:

> [T]his title shall not apply to—
>
> (a) Any claim based upon . . . the performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Second, it appears that the United States cannot be held liable in any tort action based on a constitutional claim. This exception to the FTCA stems from the fact that under 28 U.S.C. § 1346(b), the United States can only be liable where a private person would be liable *under the state law*. Since the constitutional tort is based on *federal law*, the argument follows that the United States cannot be liable for constitutional torts under the FTCA and thus retains its immunity.[136] Finally, the United States generally is able to assert the immunities and defenses of its employees as a defense in an action covered by the FTCA.[137] For example, under present law the United States cannot be held liable for any tort committed by a government employee who was acting in good faith. Although the FTCA is the predominant form of enterprise liability at the federal level, there are other statutes that have authorized suits against the United States for wrong of its employees. These include the Swine Flu Immunization Act,[138] and the Teton Dam Act.[139]

---

[131] Comment, *Constitutional Tort Remedies: A Proposed Amendment to the Federal Tort Claims Act*, 42 Conn. L. Rev. 492, 499 (1980).

[132] 19 U.S. (6 Wheat.) 264 (1821).

[133] 67 Geo. L.J. 879, 883 (1979). An injured plaintiff could also bring an application for administrative settlement. *Id.*

[134] *See* Dalehite v. United States, 346 U.S. 15, 24–25 n.9 (1953); Symposium, 42 Law & Contemp. Prob. at 86–87.

[135] Intentional Tort Amendment Act of 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (codified at 28 U.S.C. § 2680(h)).

2. *State Enterprise Liability*

The extent to which state governments provide for the shifting of the risk of liability away from the government official or employee varies from state to state.[140] Many states now provide for the protection of state government officials and employees in the form of free defense counsel, indemnification or insurance.[141] In addition, some states extend these protections to officials and employees of a state's political subdivisions.[142] However, the availability of these protections in every case is contingent upon that official's having acted in good faith.[143]

While there is clearly a trend today among state governments to adopt some form of governmental assumption of liability, a significant number of states limit the degree to which the state will indemnify an official,[144] while a few states still have no formal or extensive system for direct governmental liability.[145] Moreover, in a limited number of states, sovereign immunity is still the rule.[146]

---

[136] Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 Harv. J. on Legis. 1, 4 (1979).

[137] Norton v. United States, 581 F.2d 390 (4th Cir. 1978).

[138] Pub. L. No. 94-380, 90 Stat. 1113 (1976) (codified at 42 U.S.C. § 247b). The liability provisions were subsequently repealed by Pub. L. No. 95-626, 92 Stat. 3551 (1978).

[139] Pub. L. No. 94-400, 90 Stat. 1211 (1976).

[140] Recent developments are discussed in Chapter V and Appendix B at length.

[141] *See, e.g.*, Ariz. Rev. Stat. § 41-621, *et seq.*; Nev. Rev. Stat. §§ 41.0339 and 41.0349. *See also* Schuck, *supra* note 99, at 334.

[142] *See, e.g.*, Cal. Gov't Code § 995.

[143] The good-faith aspect of state protection of officials and employees means that the officials must be found to have acted within the "[c]ourse and scope of employment." *See, e.g.*, Mass. Gen. Laws ch. 258, § 2; Minn. Stat. Ann. § 3.736(9).

[144] *See, e.g.*, Ky. Rev. Stat. § 44.070.

[145] *See* letters from Wilson L. Condon, Attorney General of Alaska and Jeffrey P. Hallem, Assistant Attorney General of South Dakota, to Thomas J. Madden, contained in Appendix B.

[146] *See* letter from Robert O. Welford, Attorney General of North Dakota, to Thomas J. Madden, contained in Appendix B.

C. *Administrative Controls Over Federal Officials*[147]

The existing system of administrative disciplinary controls on officials constitutes a third method for dealing with governmental wrongs. The procedures which are available vary greatly depending on the official position held by the alleged wrongdoer. For example, career civil servants are subject to disciplinary proceedings with established, explicit, substantive and procedural norms.[148] These internal disciplinary proceedings are of particular interest because career civil servants represent the vast majority of government officials and are the ones most often sued. In contrast, administrative controls are not generally available for elected officials, political appointees and former officials. These latter types of officials are, however, sensitive to external controls such as adverse publicity, congressional oversight and judicial review.[149] The application of both internal and external controls to former officials of all types poses special problems for consideration.

It is important to recognize that the fundamental purpose of the existing administrative controls is to promote administrative efficiency and not to deter official wrongdoing that harms individual members of the public. The principal legislative mechanism permitting agencies to discipline officials provides for sanctions that will "promote the efficiency of the service."[150] As Supreme Court Justice Powell recognized in *Arnett v. Kennedy*: "[T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch."[151]

There is no general agreement on whether the existing administrative disciplinary system adequately satisfies either the goals of efficiency or deterrence. In light of the obvious elusiveness of quantifying the system's effectiveness in achieving these goals, it is hardly surprising that there are few promising avenues for evaluating the system, much less any substantial empirical evidence of the performance of administrative controls.[152]

---

[147] This section will discuss existing administrative sanctions only at the federal level. It is both infeasible and unnecessary to describe the myriad administrative controls in each of the fifty states and local sanctions as well.

[148] *See, e.g.*, 5 U.S.C. §§ 7101–7901.

[149] External controls are examined *infra* at pp. 3-64 through 3-70.

[150] 5 U.S.C. § 7503(a).

[151] 416 U.S. 134, 168 (1974).

[152] In developing a model for conducting the necessary evaluation a starting point would be the recent literature on the theory and historical development of administrative agencies. *See, e.g.*, Stewart, *Reformation of Administrative Law*, 88 Harv. L. Rev. 1667, 1677–78 (1975). Ackerman and Hassler, *Beyond the New Deal*, 89 Yale L.J. 1466, 1471–72 (1980); *see also* 1 K. Davis, *Administrative Law Treatise* §§ 1.6–1.9 (1978).

Several commentators suggest, however, that the administrative disciplinary system does little to improve the efficiency of the service noting that inefficiency is not a grounds for dismissal or suspension in Civil Service adverse action. *See* Mashaw, *supra* note 36; Merrill, *supra*; R. Vaughn, *The Spoiled Systems*, *supra*. It has even been suggested that civil service regulations, in general, limit the government's ability to reward good, as well as punish poor, job performance, thus removing

1. Individual Sanctions

—Elected Officials

The President and the Vice President are not subject to the administrative sanctions imposed on other officials from within the executive branch of government. They are not subject to civil service disciplinary procedures, and, under the Constitution, they can only be removed from office by the electorate or after impeachment. Of course, at the state level where there are often numerous elected executive officials, the problems of disciplining these officials are more significant.

—Political Appointees

Political appointees are subject to different administrative sanctions than are civil servants who are members of the "competitive service."[153] They may be treated more harshly than other civil servants, since they are not protected by the statutory and regulatory procedures designed to protect civil servants from arbitrary treatment.[154] Political appointees may be removed at the will of the President. This removal power is said to be implied in the appointment power set out in Article II of the Constitution. The extreme sanction of removal, however, may not be too meaningful since the President might want to retain an otherwise valuable official. While the President may unilaterally remove certain executive officials, congressional concurrence may be required to support the removal of appointed officials of independent agencies or quasi-legislative or judicial officials.[155]

Excepted Service

The President has authority to appoint a limited number of persons to positions specifically excepted from the competitive service, as defined below. These include a number of sub-cabinet level appointments of individuals believed

---

incentives for employees to engage in desirable behavior. Cass, *supra* note 125. One authority has noted that he was unaware of any case "in which the most extreme pecuniary sanctions available—loss of a government job or demotion—have been imposed for mere negligence." Mashaw, *supra* note 36, at 23.

[153] According to the Lloyd-LaFollete Act, 5 U.S.C. §§ 2101 *et seq.*, those persons whose appointments are made by nomination for confirmation by the Senate are not part of the "competitive service." Under Article II, § 2 of the Constitution, certain appointments made by the President must be approved by two-thirds of the Senate. Officials appointed to these positions are those whom this report refers to as political appointees.

[154] *Id.*

[155] *Compare* Myers v. United States, 272 U.S. 52 (1926) (President may remove postmaster without congressional approval) *with* Humphrey's Executor v. United States, 295 U.S. 602 (1935) (President may not remove FTC Commissioner without congressional approval) and Wiener v. United States, 357 U.S. 349 (1958) (President may not remove War Claims Commissioner without congressional consent).

by the President and his officers to be desirable in order to carry out policy and political objectives. They are referred to as "Schedule C" officials.[156]

—Competitive Service

The competitive service is statutorily defined in the Lloyd-LaFollete Act:[157]

> (a) The 'competitive service' consists of—
>
> (1) all civil service positions in the executive branch, except—
>
> (A) positions which are specifically exempted from the competitive service by or under statute;
>
> (B) positions to which appointments are made by nomination for confirmation by the Senate, unless the Senate otherwise directs; and,
>
> (C) positions in the Senior Executive Service.[158]

a. Reduction in Grade or Removal by the Agency for Unacceptable Performance

Federal civil servants are generally subject to performance evaluations.[159] Each agency must develop a performance appraisal system to evaluate employees periodically and provide a basis for promoting, reassigning, and demoting them. The system is meant to "recogniz[e] and reward[ ] employees whose performance so warrants," and "assist[ ] employees in improving unacceptable performance."[160] The applicable statutory and regulatory provisions do not define in detail what conduct is so unsatisfactory as to warrant disciplinary action. Gross abuses of power or constitutional violations may fall within the definition.[161]

Subject to notice and hearing requirements, "an employee may be reduced in grade or removed at any time during the performance appraisal cycle that the employee's performance in one or more critical elements of the job becomes unacceptable."[162] A "critical element" is "a component of an employee's job that is of sufficient importance that performance below the minimum standard established by management requires remedial action" such as removal or a grade reduction, even without regard to the employee's performance on other components of the job.[163] However, a reduction in grade or removal may be based only on those instances of unacceptable conduct which occurred within the past year.[164]

---

[156] 5 C.F.R. § 6.2. Schedule C positions are those of a confidential or policy-determining character. Except as otherwise may be required by statute, Civil Service rules and regulations do not apply to removals from positions in Schedule C or from positions excepted from the competitive service by statute. Exec. Order No. 10577, 5 U.S.C. § 3301 note.

[157] "Civil service" is defined in the statute to include "all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services." 5 U.S.C. § 2101(1).

[158] 5 U.S.C. § 2102. Although the statute here distinguishes between the "competitive service" and the "Senior Executive Service," members of these two groups are generally subject to the same kinds of administrative sanctions and receive the same statutory and regulatory protection. The statute also provides that even those whose appointments are subject to Senate confirmation may be specifically included in the competitive services by statute. 5 U.S.C. § 2102(b).

[159] The details of which federal employees are subject to this sort of evaluation are set out in 5 U.S.C. § 4301, 5 C.F.R. § 432.201(b), 5 C.F.R. § 432.201(c), and statutes and regulations cited therein.

[160] 5 U.S.C. § 4302.

[161] *See generally* 5 C.F.R. Part 432.

[162] 5 C.F.R. § 432.203(a).

Disciplinary actions for unsatisfactory performance must be initiated by the employee's own agency. The statute does not provide for either a private right of action by members of the public, or for direct prosecution by an outside agency such as the Office of Personnel Management (OPM).[165] However, members of the public, or other agencies might of course bring an employee's actions to the attention of his or her agency in an attempt to precipitate disciplinary proceedings. They might also try to employ publicity to spur the agency into action.

b. Disciplinary Sanctions Imposed By the Agency to "Promote the Efficiency of the Service"

Agencies may remove, suspend, reduce in grade, reduce in salary, or furlough for thirty days or less, employees, when such measures would "promote the efficiency of the service."[166] These sanctions are brought into play by the employee's own agency, rather than by a private right of action, and must be accompanied by certain procedural protections.

---

[163] 5 C.F.R. § 430.202(e). An employee whose reduction in grade or removal is proposed because of an unsatisfactory performance is entitled to thirty days notice of the charges against him or her, representation by an attorney, an opportunity to answer the charges orally and in writing, and a written decision. 5 U.S.C. § 4303(b). An employee who is reduced in grade or removed because of inadequate performance may appeal the agency's decision to the Merit Systems Protection Board, a federal body dealing with disciplinary hearings in most of the agencies. 5 U.S.C. § 4303(e). The Merit Systems Protection Board and this appeal mechanism are described in detail in *Rescuing Riffs: An Overview of the Merit Systems Protection Board* 6 District Lawyer 32–35 (1982). In cases involving a removal, the Board itself must hear the appeal. When only a demotion is involved, the Board may appoint an administrative law judge to hear the appeal. The agency's decision may be sustained only if it is based on "substantial evidence." 5 U.S.C. § 7701(c)(1)(A). Under certain circumstances the Office of Personnel Management may also participate in such appeals. 5 U.S.C. § 7703(d). Finally, "[a]ny employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision." 5 U.S.C. § 7703(a)(1). The procedures, jurisdiction, and standards appropriate to such appeals are set out in 5 U.S.C. § 7703.

The courts are frequently deferential to decisions made by the Merit Systems Protection Board. *See, e.g.*, Gueory v. Hampton, 510 F.2d 1222, 1225 (D.C. Cir. 1974); Mendelson v. Macy, 356 F.2d 796 (D.C. Cir. 1966).

[164] 5 U.S.C. § 4303(c)(2)(A).

[165] The OPM can, however, within one year of an employee's appointment, bring a direct action against employees when discipline is necessary "to promote the efficiency of the agency." The Office of Special Counsel can in appropriate circumstances prosecute a disciplinary action. 5 U.S.C. §§ 1201–09.

[166] *See* 5 U.S.C. §§ 7503, 7513, 7543; 5 C.F.R. §§ 752.101–752.606. This group of sanctions is referred to as "adverse actions."

The phrase ''promote the efficiency of the service'' is broad.[167] Nevertheless, OPM regulations defining how agencies shall determine whether a sanction is appropriate illustrate the type of misconduct that is meant to be subject to disciplinary actions.[168] It is apparent that these regulations are primarily directed to promoting administrative efficiency and *not* toward deterring official wrongs which result in harm to individual members of the public.

Courts have upheld dismissals of employees for a broad range of conduct such as leaving a job without permission for eleven days,[169] receiving gratuities and accepting loans from a company with whom the employee had official dealings,[170] behaving unbearably discourteously toward subordinates and coworkers,[171] failing to carry out a superior's orders,[172] and exercising bad judgment.[173]

---

[167] The Supreme Court has found that it is not so vague or overbroad as to violate the due process clause of the fifth amendment. *See* Arnett v. Kennedy, 416 U.S. 134, 159–60 (1974), *reh'g denied*, 417 U.S. 977 (1974). The Supreme Court refused to strike down the Lloyd-LaFollete Act in a suit brought by a former competitive service employee of the Office of Economic Opportunity. Kennedy had been removed by the agency for, among other charges, allegedly attempting to bribe a community representative. The Court noted that in framing the standard ''to promote the efficiency of the service,'' Congress sought to ''give myriad different federal employees performing widely disparate tasks a common standard of job protection.'' *Id.* at 159.

[168] 5 C.F.R. § 731.202 provides:

> (a) *General.* In determining whether its action will promote the efficiency of the service, OPM shall make its determination on the basis of:
>
> (1) Whether the conduct of the individual may reasonably be expected to interfere with or prevent effective performance in the position applied for or employed in; or
>
> (2) Whether the conduct of the individual may reasonably be expected to interfere with or prevent effective performance by the employing agency of its duties and responsibilities.
>
> (b) *Specific factors.* Among the reasons which may be used in making a determination under paragraph (a) of this section, any of the following reasons may be considered a basis for disqualification:
>
> (1) Delinquency or misconduct in prior employment;
> (2) Criminal, dishonest, infamous or notoriously disgraceful conduct;
> (3) Intentional false statement or deception or fraud in examination or appointment;
> (4) Refusal to furnish testimony as required by § 5.3 of this chapter;
> (5) Habitual use of intoxicating beverages to excess;
> (6) Abuse of narcotics, drugs, or other controlled substances;
> (7) Reasonable doubt as to the loyalty of the person involved to the Government of the United States; or
> (8) Any statutory disqualification which makes the individual unfit for the service.
>
> (c) *Additional considerations.* In making its determination under paragraph (a) of this section, OPM shall consider the following additional factors to the extent that these factors are deemed pertinent to the individual case:
>
> (1) The kind of position for which the person is applying or in which the person is employed, including its sensitivity;
> (2) The nature and seriousness of the conduct;
> (3) The circumstances surrounding the conduct;
> (4) The recency of the conduct;
> (5) The age of the applicant or appointee at the time of the conduct;
> (6) Contributing social or environmental conditions;
> (7) The absence or presence of rehabilitation or efforts toward rehabilitation.

[169] Chiriaco v. United States, 235 F. Supp. 850 (N.D. Ala. 1963), *aff'd*, 339 F.2d 588 (5th Cir. 1964).

Courts have required that there be a nexus between the unsatisfactory conduct and the employee's job performance. Even immoral[174] or criminal[175] conduct does not support dismissal unless it is shown to be related to the employee's job performance. Many official abuses of power or commissions of torts might be considered severe enough to require the imposition of disciplinary sanctions to "promote the efficiency of the service." On the other hand, the official can always defend the action on the basis that the misconduct could not be "reasonably" expected to affect the job performance, or does not "reasonably" interfere with the agency's effective performance of its duties.

An employee who is brought up on disciplinary charges to "promote the efficiency of the service" is entitled to advance written notice, an opportunity to answer the charges orally and in writing, representations by an attorney, and a written decision.[176] Except in the case of a suspension for fourteen days or less, the employee has a right to appeal the agency's decision to the Merit Systems Protection Board.[177]

---

[170] Monahan v. United States, 354 F.2d 306 (Ct. Cl. 1965).

[171] Green v. Baughman, 243 F.2d 610 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 819 (1957).

[172] Halsey v. Nitze, 390 F.2d 142 (4th Cir. 1968), *cert. denied*, 392 U.S. 939 (1968).

[173] Korman v. United States, 462 F.2d 1382 (Ct. Cl. 1972).

[174] In Major v. Hampton, 413 F. Supp. 66 (E.D. La. 1976), the court overturned the dismissal of a married Internal Revenue Service agent who rented a "shack pad" in New Orleans. The court found no rational basis for concluding that the agent's conduct would discredit him or the agency.

[175] Grebosz v. United States Civil Service Commission, 472 F. Supp. 1081 (S.D.N.Y. 1979).

[176] The specific applicable procedures are set out in 5 U.S.C. §§ 7503, 7513, and 7543. The procedures are somewhat less rigorous when only a suspension for fourteen days or less is being sought. The employee is not *entitled* to a hearing, but the agency may choose to provide one. 5 U.S.C. §§ 7513(c), 7543(c). In Arnett v. Kennedy, *supra* note 167, 156–58, the Supreme Court found that a hearing prior to the determination was not constitutionally required. However, the appeal mechanism does provide for a hearing after the administrative action has been taken.

[177] 5 U.S.C. §§ 7513(d), 7543(d). The Office of Personnel Management (OPM) regulations provide that OPM may, for a period of one year after an appointment, "instruct an agency to remove an appointee when OPM determines this action will promote the efficiency of the service." 5 C.F.R. § 731.201. When OPM acts to bring about the removal of an employee, it need not comply with all the procedures set out for removals initiated by the agencies themselves. 5 C.F.R. § 731.302(c); 5 C.F.R. § 731.201. The legitimacy of this regulation is based on 5 U.S.C. §§ 3301 and 3302, which give the President (and thus OPM) general powers to prescribe regulations so as to promote the efficiency of the service. Even after an employee has been working for more than one year, OPM may require the removal of an appointee who it finds made an intentional false statement or perpetrated a deception or fraud in the course of his or her examination or appointment. 5 C.F.R. § 731.202.

D. *External Controls*

Executive officials are subject to sanctions from without as well as within the administrative system. In general, however, these sanctions depend on publicity, and are most commonly effective only against outrageous or notorious conduct. These sanctions are rarely exercised merely because of the harm suffered by a single individual. In addition, the sanctions usually apply only to current as opposed to former officials. While the latter continue to be liable for actual crimes they have committed, they are only subject to impeachment and the other sanctions described below if they have taken another public office. Former officials, of course, would continue to be vulnerable to adverse publicity.

1. *Impeachment*

Under the Constitution "[t]he President, Vice President and all civil Officers of the United States, shall be removed from office on Impeachment for, and conviction of Treason, Bribery, or other high Crimes and Misdemeanors."[178] A vote of two thirds of the Senate is required to bring about such a removal.[179] Conceivably therefore, if the President, Vice President, or other high ranking federal offical caused a serious harm to an individual, this official might be threatened with impeachment. But "high Crimes and Misdemeanors" may be interpreted quite narrowly, and more significantly it would be the extraordinary case that would overcome the institutional hurdles to impeachment.

2. *The Electorate*

Elections subject elected officials directly, and others indirectly, to incentives and sanctions for their performance. The effectiveness of their control hinges upon whether misconduct is publicized. The risk of losing an election because of voters' reactions to an individual case of wrongdoing by any elected official is minimal unless the incident involved criminal or particularly scandalous behavior. Obviously, the impact on the election of the President and Vice President of the conduct of a single official is even less substantial.

3. *Congressional Control*

Congress may, at least theoretically, curb executive abuses of power in three ways. First, it may in some instances override or reverse administrative decisions it finds unacceptable. Second, it may seek to curb future abuses by enacting limiting legislation. Third, Congress may conduct oversight hearings. However, each of these sanctions is limited both by the fact that only a few very serious problems of a national magnitude can possibly be dealt with at the Congressional level and by separation of powers considerations.

Many executive decisions are taken too quickly for Congress to have an opportunity to react. For example, if a law enforcement agent were to decide to conduct an illegal search, Congress could not possibly stop the search before it happened. Furthermore, since Congress cannot possibly be kept informed of the plans or acts of all government officials, it cannot serve as the regulatory body which insures that individual government officials do not abuse their discretion. Finally, there are constitutional limits on the extent to which Congress can intervene in executive branch affairs.[180]

---

[178] U.S. Const. art. II, § 4.

[179] U.S. Const. art. I, § 3, cl. 6.

This same concern arises with respect to congressional regulation of future agency activity. While Congress clearly has the power to abolish and create certain agencies, as well as to define their general purposes, it does not have unlimited authority to dictate precisely how executive branch affairs should be conducted.[181] Thus, while Congress may generally exert an influence by, for example, defining those agencies with which it is particularly displeased, or by passing limiting legislation,[182] it is unrealistic to expect Congress to bear much of the burden of insuring that individual executive officials perform their jobs properly.

Like the impeachment and electorate sanctions, congressional oversight is highly dependent upon publicity. Unless the public can be made aware of and becomes outraged at executive abuses, Congress will probably not spend a great deal of its time attempting to discipline executive officials.

4. *Special Prosecutor*

High-level administrative officials[183] are subject to investigation by a court-appointed Special Prosecutor if they are suspected of violating any federal criminal law other than a petty criminal offense.[184] Therefore, to the extent that federal criminal law overlaps with executive abuses of authority, the appointment of a Special Prosecutor may be regarded as a sanction against executive wrongs. This sanction is useful only in a very limited number of cases, and is unlikely to be employed unless public exposure of an executive official's alleged abuses have created a political demand for investigation.

The law covering the appointment of Special Prosecutors requires that if the Attorney General receives information that high-level officials have committed federal crimes, the Department of Justice is to conduct a preliminary investigation. Based on this investigation the Attorney General may recommend that no Special Prosecutor be appointed.[185] If the Attorney General does not so recommend, he or she shall apply for the appointment of a Special Prosecutor.[186] Special statutory provisions cover the authority for removal of a Special Prosecutor,[187] who may bring suits based on his investigations, and submission to Congress of reports on his activities.

---

[180] *See, e.g.*, Nixon v. Administrator of General Services, 433 U.S. 425 (1977) (holding that the Presidential Recordings and Materials Preservation Act did not violate the separation of powers principle, but noting that it is appropriate to examine the extent to which congressional legislation might prevent the executive from performing its function); Gregg v. Georgia, 428 U.S. 153, 199 n. 50 (1976) (per Stewart, J., with Powell, J., and Stevens, J., concurring and White, J., Burger, J., Rehnquist C.J., and Blackmun, J., concurring in part with the judgment) (it would be unconstitutional to prohibit the President from granting a reprieve from a death sentence as matter of executive clemency).

[181] *Gregg*, *supra* note 180.

[182] *See*, *e.g.*, the War Powers Resolution, 50 U.S.C. §§ 1541–48, requiring the President to consult Congress before taking certain military actions.

[183] Special prosecutors are to be appointed to investigate the President and the Vice President, Cabinet officials, high-level Executive Office employees, and certain campaign officials. 28 U.S.C. § 591.

[184] 28 U.S.C. § 591.

Therefore, while Special Prosecutors can in certain situations conduct relatively independent investigations from within the administration, this institution is unlikely to prove very effective as a general means of dealing with wrongs committed by executive officials.

5. *Public Pressure*

Public pressure plays an important role in correcting and deterring improper activities of government officials. The sanctions such as impeachment, nonreelection, and the appointment of a Special Prosecutor, are usually imposed only when sufficient public pressure is brought to bear. However, such pressure can be brought to bear only if a wrongful act is accompanied by sufficient publicity and then only if the public is able to make its discontent known. Therefore, it is unrealistic to presume that substantial public pressure could generally be aroused with respect to the activities of most government officials.

The public lacks the investigative and informational capacity to determine whether each of the thousands of federal executive officials are carrying out their jobs properly. Thus, unless a low-level official engaged in either extreme or repeatedly wrongful actions, the public would probably not become aware that a wrongful act had occurred. Moreover, it will generally prove difficult to organize public pressure against an official who has not harmed a substantial number of persons.

* * *

The Role of Administrative and External Controls in the Civil Sanction System

Existing internal administrative and independent external controls provide means by which government officials may be sanctioned for their wrongdoing. However, the current federal system for administrative disciplinary controls was not developed primarily to regulate conduct that directly harms the public, and for this reason cannot fully serve all the goals related to official liability and immunity rules such as compensation of victims and deterrence.

Furthermore, former officials are not subject to internal disciplinary procedures. Nor are they subject to impeachment or removal from office.[188] Other officials, those appointed or elected, are subject only to sanctions rarely employed as a result of harms suffered by individual members of the public.

---

[185] 28 U.S.C. § 592(b)(1).

[186] Under 28 U.S.C. § 49, a panel of judges from the Circuit Court of Appeals for the District of Columbia is responsible for appointing the Special Prosecutor.

[187] 28 U.S.C. §§ 594–96.

[188] However, a government official who has left one government position but taken on a new one may be subject to certain disciplinary sanctions for actions taken in the old job.

Nevertheless, while the existing system of disciplinary and other remedies does not satisfy all the goals of a system dealing with governmental wrongdoing, it is a good first step toward such a system. Most importantly, it provides an established mechanism with sufficient resources and expertise to investigate the acts of numerous individual government officials. Thus, in developing an alternative method of dealing with governmental wrongdoing one should build on this existing system, but adjust it as well, so that it covers high ranking officials as well as civil servants and so that it explicitly applies to misconduct that results in harm to individual members of the public.

IV. Analysis: Changes at the Federal Level

There is almost universal dissatisfaction with the current system of civil sanctions for violations of constitutional rights by federal officials. This dissatisfaction stems, in part, from the recognition that private damage actions against individual government officials do not afford the victims of official misconduct "a financially responsible defendant."[1] Of equal concern to many is the perception that the threat of personal liability—or, at a minimum, the risk of suit—deters not only improper conduct by government officials, but proper conduct as well.[2] Adding to these pragmatic concerns is the conviction that the government *ought* to be liable for the wrongs committed in its name, rather than impose the loss upon an individual official "who is more anvil than hammer."[3] Finally, some critics of the current system cite the supposed cost to the government of retaining private counsel to defend individual government officials in *Bivens* suits.[4]

---

[1] *Federal Tort Claims Act: Hearings Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 95th Cong., 2d Sess. 4 (1978) (statement of Attorney General Griffin B. Bell) (hereinafter cited as *1978 House Hearings*); *see Tort Claims: Hearings on H.R. 24, H.R. 3060, and H.R. 3795 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 97th Cong., 1st Sess. 27 (1982) (statement of Edward C. Schmults, Deputy Attorney General) (hereinafter cited as *1982 House Hearings*).

[2] *See 1978 House Hearings, supra* note 1, at 4 (statement of Attorney General Bell); 1982 House Hearings, *supra* note 1, at 27 (statement of Deputy Attorney General Schmults).

[3] Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281, 347, *reprinted in Federal Tort Claims Act: Hearing on S. 1775 Before the Subcommittee on Agency Administration of the Senate Committee on the Judiciary (Pt.2)*, 97th Cong., 2d Sess. 35 (1982) (hereinafter cited as *1982 Senate Hearing*).

[4] Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). *See, e.g., Amendments to the Federal Tort Claims Act: Joint Hearing on S. 2117 Before the Subcommittee on Citizens and Shareholders Rights and Remedies and the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary (Pt.1)*, 95th Cong., 2d Sess. 7 (1978) (statement of Attorney General Bell) (hereinafter cited as *1978 Senate Hearing*). Employment of such private counsel is often militated by ethical or policy considerations. *See 1982 House Hearings, supra* note 1, at 241–42 (statement of Stanley S. Harris, U.S. Attorney for the District of Columbia); *Amendments of the Federal Tort Claims Act: Hearings Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 96th Cong., 1st Sess. 3 (1979) (statement of Deputy Attorney General Benjamin R. Civiletti) (hereinafter cited as *1979 House Hearings*). It has been estimated that the Justice Department has spent over $2 million for such private counsel since 1976. *1982 House Hearings, supra* note 1, at 24 (testimony of Deputy Attorney General Schmults); Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 Harv. J. on Legis. 1, 9 n. 28 (1979).

The actual economy to the federal government resulting from an enterprise liability system is uncertain at best. *See 1979 House Hearings, supra*, at 12 (Department of Justice Memorandum, Cost estimate for the proposed amendments to Federal Tort Claims Act (May 7, 1979)). Insofar as substituting the United States as defendant would afford plaintiffs "a financially responsible defendant," it is far from obvious that adopting an enterprise liability system would save the government any money at all, except to the extent that legislation establishing such liability would definitively permit the government to settle rather than pay to litigate cases involving alleged employee misconduct. *See 1982 House Hearings, supra*, note 1 at 248 (statement of Royce C. Lamberth, Chief, Animated by these and other subsidiary concerns, critics of the current system of civil sanctions have sought for the past ten years its modification or replacement—at least at the federal level—by a system of "enterprise liability" in which the government, rather than the individual government official, would be liable in damages for constitutional injuries caused by official misconduct.[5] Substituting the government for the individual official as defendant in civil damage actions would promote the goal of compensating victims of such misconduct, while the goals of deterrence and employee accountability would be served by a system of administrative rather than judicial sanctions.[6]

Despite wide support for the broad goals of enterprise liability, legislative efforts to establish such a system have so far foundered on disagreements over appropriate substitute mechanisms of accountability. Failure to reach agreement

---

Civil Division, Office of the U.S. Attorney for the District of Columbia) (arguing that substitution of United States as defendant would facilitate settlement and reduce litigation).

It thus appears that the major gain from the standpoint of government policy would be to assure the government's complete control over the defense of constitutional tort actions. *Cf. id.* at 2–4 (statement of U.S. Attorney Harris); *1979 House Hearings, supra*, at 3–4 (statement of Deputy Attorney General Civiletti).

[5] *See* H.R. 10439, 93rd Cong., 1st Sess. (1973); S. 2558, 93rd Cong., 1st Sess. (1973); H.R. 12715, 93rd Cong., 2d Sess. (1974); H.R. 9219, 95th Cong., 1st Sess. (1977); H.R. 9437, 95th Cong., 1st Sess. (1977); S. 2117, 95th Cong., 1st Sess. (1977); S. 2868, 95th Cong., 2d Sess. (1978); S. 3314, 95th Cong., 2d Sess. (1978); H.R. 193, 96th Cong., 1st Sess. (1979); H.R. 2659, 96th Cong., 1st Sess. (1979); S. 695, 96th Cong., 1st Sess. (1979); H.R. 24, 97th Cong., 1st Sess. (1981); H.R. 1696, 97th Cong., 1st Sess. (1981); S. 1775, 97th Cong., 1st Sess. (1981); H.R. 6359, 97th Cong., 2d Sess. (1982); H.R. 7034, 97th Cong., 2d Sess. (1982); H.R. 595, 98th Cong., 1st Sess. (1983). Copies of the foregoing bills are reproduced in Appendix A-1 hereto, together with a summary and chronology of each.

In 1974, Congress amended the Federal Tort Claims Act, 42 U.S.C. §§ 1346(b), 2671–2680 ("FTCA"), to permit suits against the government for assault, battery, false arrest, abuse of process, and malicious prosecution by federal investigative or law enforcement officers. Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (codified at 28 U.S.C. § 2680(h)). Such torts are arguably coterminous with claims arising under the due process clause of the fifth amendment and other provisions of the Bill of Rights. *See infra* Part IV-B(2)(g). Having enacted Pub. L. No. 93-253, the 93rd Congress failed to act on alternative legislation proposed by the Nixon Administration that would have broadened the FTCA to cover all claims of unconstitutional torts involving any government official. *Federal Tort Claims Amendment: Hearings on H.R. 10439 Before the Subcommittee on Claims and Governmental Relations of the House Committee on the Judiciary*, 93rd Cong., 2d Sess. 14–15 (1974) (statement of Irving Jaffe, Acting Assistant Attorney General, Civil Division, Department of Justice). *See also Intelligence Activities and the Rights of Americans: Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, S. Rep. No. 755, 94th Cong., 2d Sess. 336–38 (1976) (recommending statutorily-created federal cause of action against the government and individual federal intelligence officer or agent for actual or threatened injury caused by a violation of the Constitution committed under color of law).

[6] *See infra* Part IV-B(2)(b). Calls for a system in which government officials would be indemnified either by the government or under an insurance program have failed to gain currency, presumably because such as system could not eliminate the debilitating effect on employee morale and decisionmaking vigor said to result from the risk of suit. In addition, insurers are reportedly unwilling to cover at least some federal officials. *See 1978 House Hearings, supra* note 1, at 31 (statement of John S. McNerney, National President, Federal Criminal Investigators Association).

upon such mechanisms reflects the fact that assuring redress and deterrence, and fostering vigorous decisionmaking by federal officials, are often seen as incompatible goals.[7] Thus, although legislative proposals to establish some form of enterprise liability at the federal level have been sounded since shortly after *Bivens* itself was decided,[8] none has yet been adopted.[9]

Legislation pending in the 97th Congress would have amended the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680, to provide an exclusive remedy against the United States for constitutional torts committed by government officials while acting within the scope of their office or employment. The following section analyzes that proposed legislation—H.R. 7034 (reintroduced in the 98th Congress as H.R. 595) and S. 1775—and considers a number of issues raised by those and other bills that illustrate the principal problems involved in establishing a system of enterprise liability at the federal level. Analysis of these bills may facilitate consideration of any legislation that may be introduced on this subject in the 98th Congress.

A. SUMMARY OF ISSUES RAISED BY PROPOSALS TO ESTABLISH FEDERAL ENTERPRISE LIABILITY

1. *Proposed Legislation*

(a) *H.R. 7034.*[10]

H.R. 7034 would have amended the Federal Tort Claims Act ("FTCA") to provide that the United States would be exclusively liable with respect to a claim arising under the Constitution of the United States for torts committed by government officials acting within the scope of their office or employment.[11] With respect to any constitutional tort claim, the United States would have been made liable for the greater of either actual damages or liquidated damages, which would have been assessed in an amount which was the greater of either (A) $2,000 or (B) in the case of a continuing violation, $200 per day for each violation.[12] If it were established that the defendant official acted with malicious intent or reckless disregard for the plaintiff's constitutional rights, "additional" damages of up to $100,000 would have been authorized.[13] A successful claimant would also have been entitled to receive reasonable attorney fees and all other litigation costs reasonably incurred, inlcuding attorney fees or costs attributable to processing an administrative claim for money damages based on the alleged constitutional tort.[14]

---

[7] *See 1978 Senate Hearing, supra* note 4, at 8 (statement of Attorney General Bell). The current Administration has taken the position that:

> The problem here is not really Government employees acting in an unlawful fashion . . . [but rather] the overhang of litigation and the burden on Government employees of having . . . to be worried about their own cases.

Federal Tort Claims Act: Hearings on S. 1775 Before the Subcommittee on Agency Administration of the Senate Committee on the Judiciary (Pt.1), 97th Cong., 1st Sess. 7–8 (1981) (statement of Deputy Attorney General Schmults) (hereinafter cited as *1981 Senate Hearings*). The previous Administration, by contrast, took the view that the problem of deterrence was sufficiently serious that a new employee discipline proceeding was warranted "to replace the sanction against employee misconduct presumably lost by immunizing employees from civil liability." *1979 House Hearings, supra* note 4, at 4 (statement of Deputy Attorney General Civiletti).

[8] *See supra* note 4.

[9] Of the 17 bills reproduced in Appendix A-1, only three—H.R. 9219, S. 3314, and H.R. 7034 (in lieu of H.R. 24)—were even forwarded to full committee by the responsible subcommittee. None was ever reported out of committee.

[10] H.R. 7034 was pending in the House Judiciary Committee at the end of the 97th Congress, having been approved and forwarded by the Subcommittee on Administrative Law and Governmental Relations. H.R. 7034 was reintroduced in the 98th Congress as H.R. 595. 129 Cong. Rec. H94 (daily ed. Jan. 6, 1983).

Under H.R. 7034, a suit against an individual government official for an alleged constitutional tort would have become a suit against the United States "[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the suit arose. . . ."[15] The United States would have been free to assert as a defense to a constitutional tort claim "the absolute or qualified immunity of the employee whose act gave rise to the claim, or his reasonable good faith belief in the lawfulness of his conduct."[16]

---

[11] H.R. 7034, § 202 (proposed 28 U.S.C. § 2699(b)).

Both H.R. 7034 and S. 1775 would have provided an exclusive remedy against the United States not only with respect to constitutional torts, but also generally in suits based upon acts or omissions of United States officials committed within the scope of office or employment. *See* H.R. 7034, § 101 (proposed 28 U.S.C. § 2679(b)); S. 1775, § 5(a) (same). Currently, a plaintiff may, as a rule, sue both the official and the government for the same conduct, stating a constitutional tort claim against the former under *Bivens*, and a non-constitutional tort claim against the latter under the FTCA. *See* Carlson v. Green, 100 S. Ct. 1468, 1472 (1980) (construing 28 U.S.C. § 2680(h)). Only in a limited set of cases has Congress explicitly made suit against the government under the FTCA an exclusive remedy. *See* 28 U.S.C. § 2679(b) (operation of motor vehicles by federal employees); 38 U.S.C. § 4116(a), 42 U.S.C. §§ 233(a), 2458(a) (malpractice by certain government health personnel). The statutory enshrinement of a distinction between constitutional and non-constitutional torts has been criticized as unsound and unnecessary. *See, e.g., 1979 House Hearings, supra* note 4, at 23 (statement of George A. Bermann, Professor of Law, Columbia University Law School).

[12] H.R. 7034, § 202 (proposed 28 U.S.C. § 2693). Proposals to replace the *Bivens* remedy have typically provided for liquidated damages to assure successful plaintiffs monetary recovery where actual damages are small or nonexistent, on the premise that proof of concrete injury "is often impossible in the case of nonviolent conduct involving violations of constitutional rights which are of an intangible nature." *1978 Senate Hearing, supra* note 4, at 8 (statement of Attorney General Bell). A liquidated damages provision by definition establishes both a floor and a ceiling on the government's liability in cases where it is appropriate to award such damages. *See infra* note 44.

[13] H.R. 7034, § 202 (proposed 28 U.S.C. § 2693). Notwithstanding the provision for such "additional" damages, H.R. 7034 purported to preclude "punitive damages." *Id.* ([t]he United States . . . shall not be liable . . . for punitive damages").

[14] H.R. 7034, § 202 (proposed 28 U.S.C. § 2698(a)). Under H.R. 7034, an action could not have been instituted against the United States unless the claim had first been presented to, and denied by, the appropriate federal agency. *Id.* (proposed 28 U.S.C. § 2694(a)). A similar conditon applies to suits against the United States under the FTCA. *See* 28 U.S.C. § 2675.

[15] H.R. 7034, § 202 (proposed 28 U.S.C. § 2698(d)(1)). Certification by the Attorney General would have triggered removal to federal court of a suit brought in a state court. *Id.* § 202 (proposed 28 U.S.C. § 2698(d)(2)). The Attorney General's certification that the defendant official was acting within the scope of his office or employment at the time of the incident would have been

Finally, H.R. 7034 provided that, where a constitutional tort action resulted in a judgment against the United States or an award, compromise, or settlement paid by the United States, "the Attorney General shall forward the matter for such further administrative investigation or disciplinary action as may be appropriate to the head of the department or agency which employed the employee at the time of the employee's alleged act or omission giving rise to the claim."[17] H.R. 7034 was drafted so as to preserve the right to a jury trial in constitutional tort cases, a right now provided by the *Bivens* remedy.[18]

(b) S. 1775[19]

S. 1775 was substantially similar to H.R. 7034, with three significant exceptions. First, S. 1775 would have provided that the individual official and the United States would be jointly liable for punitive damages of up to $50,000 for the official's willful and malicious violation of constitutional rights.[20] Second, no provision was made under S. 1775 for any award to a prevailing plaintiff of attorney fees or other litigation costs. And, third, S. 1775 would not have provided for jury trial in all constitutional tort cases, but only in cases either pending on the date of the enactment of the bill, or based on claims that had arisen as of that date.[21]

2. *Assessment of Issues Raised by H.R. 7034 and S. 1775*

As noted above, there is nearly unanimous support for the proposition that the United States, and not individual federal officials, should bear the ultimate

---

"binding and conclusive [only] on the United States and the defendant employee," *id.* § 202 (proposed 28 U.S.C. § 2698(d)(3)), and not on the party bringing the action.

If a plaintiff successfully challenged the Attorney General's certification upon removal, the district court would have been required to remand the cause to the state court, inasmuch as the Attorney General's certification was the predicate for removal. *Id.* If the Attorney General did not make such a certification, the defendant employee would have been allowed to request the federal district court—but apparently not the state court—in which the suit has been filed to certify that the defendant was acting within the scope of his office or employment at the time of the alleged injury. *Id.*

[16] H.R. 7034, § 202 (proposed 28 U.S.C. § 2693).

[17] H.R. 7034, § 202 (proposed 28 U.S.C. § 2700).

[18] *Id.* § 303(a). Significantly, the power to award "additional" damages for malicious constitutional torts was vested with the court, not the jury. *See supra* note 13.

[19] S. 1775, 97th Cong., 1st Sess., 127 Cong. Rec. S12, 152–53 (daily ed. Oct. 26, 1981). S. 1775 was pending in the Subcommittee on Agency Administration of the Senate Judiciary Committee at the end of the 98th Congress. Senator Grassley, Chairman of the Subcommittee, was expected to introduce new legislation in the 98th Congress.

[20] S. 1775, § 3 (proposed 28 U.S.C. § 2674(b)(3)) (amendment of Sen. Specter, adopted (Sept. 23, 1982)). The United States would have been entitled to recover the amount paid under this subsection from the official. *Id.* Under S. 1775, the maximum amounts allowed for actual and liquidated damages were also lower than those set by H.R. 7034. *Id. See infra* note 44.

[21] S. 1775, § 10(b)(1).

financial responsibility for constitutional violations.[22] But differences have inevitably arisen over central elements of any new system of exclusive enterprise liability, and both H.R. 7034 and S. 1775 aptly illustrate the dilemmas facing efforts to establish such a system.

(a) Retention of the "Good Faith" Defense.

The most hotly disputed issue in establishing an exclusive system of enterprise liability is whether the government should be allowed, as H.R. 7034 and S. 1775 provided, to assert as a defense the official's "absolute or qualified immunity . . . or his reasonable good faith belief in the lawfulness of his conduct."[23]

For obvious reasons, the availability of the "good-faith" defense would—especially after *Harlow v. Fitzgerald*—significantly limit the extent of the government's liability for the constitutional torts of its officials, and thus the availability of damage awards to the victims of such torts to redress violations of constitutional rights.[24]

---

[22] *But see 1982 House Hearings, supra* note 1, at 431, 435–40 (statement of Thomas Devine on behalf of the Government Accountability Project ("GAP") of the Institute for Policy Studies). Disputing the premise that the threat of personal liability "functionally paralyzes any conscientious federal employee," *id.* at 435, and that judgment-proof government officials thwart the goal of victim compensation, *id.* at 438–39, GAP has proposed a modified version of H.R. 7034 that would supplement, but not supplant, the *Bivens*-type remedy. *Id.* at 451. Similarly, Professor Neuborne has suggested that the Federal Tort Claims Act simply be amended to permit *Bivens* defendants to implead the United States, establishing "a self-executing mechanism [that] would allocate the economic loss caused by a constitutional violation to the proper party." *1981 Senate Hearings, supra* note 7, at 29 (statement of Professor Burt Neuborne on behalf of ACLU).

These proposals for an alternative to an exclusive system of enterprise liability echo the joint government/employee liability recommended by the Senate Select Committee, S. Rep. No. 755, *supra* note 5, at 336–38 (1974), and the Senate Committee on Government, S. Rep. No. 588, 93rd Cong., 1st Sess. 2–4, *reprinted in* 1974 U.S. Code Cong. & Ad. News 2789 (analyzing proposed amendment to H.R. 8245)—ultimately enacted into law as Pub. L. No. 93-253, *supra* note 5—to provide, among other things, a remedy against the United States for certain intentional non-constitutional torts of its investigative and law enforcement officers). Attorney General Bell did not favor allowing a plaintiff to choose between suing the employee and suing the government. *1978 Senate Hearing, supra* note 4, at 119 (Letter from Justice Department to Sen. Abourezk (Mar. 13, 1977)).

[23] H.R. 7034, § 202 (proposed 28 U.S.C. § 2693); S. 1775, § 5(b) (proposed 28 U.S.C. § 2679(d)(2)). *Cf.* Norton v. United States, 581 F.2d 390, 394–95 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978) (holding that Congress intended to allow the government to assert an official's good faith in suits brought under 28 U.S.C. § 2680(h)). The Supreme Court appears to define qualified immunity as the right to invoke the good-faith defense. Harlow v. Fitzgerald, 102 S. Ct. 2727, 2737 (1982); *see infra* note 24. For convenience, the issue of whether to allow the government to assert either the absolute *or* qualified immunity of its officials is discussed herein under the rubric of whether to allow the government to assert the good-faith defense.

Several earlier bills, in contrast to H.R. 7034 and S. 1775, would have precluded the United States from asserting—except in cases involving a Member of Congress, a judge, a prosecutor, or a person performing analogous functions—the absolute or qualified immunity of the official whose conduct was at issue, or the official's reasonable good-faith belief in the lawfulness of his conduct. *See* S. 3314, *supra* note 5, § 3(b); H.R. 2659, *supra* note 5, § (3); S. 695, *supra* note 5, § 3; H.R. 24, *supra* note 5, § 3. This approach was supported by the previous Administration. *See infra* note 26. Under S. 2117, *supra* note 5, § 3, and under H.R. 9219, *supra* note 5, § 3, a federal officer's or employee's "good faith reliance on a court order or legislative authorization" would have constituted a complete defense in a constitutional tort suit against the United States, but the United States would nevertheless have been required to compensate the person whose constitutional rights had been violated.

Moreover, allowing the government to assert the good-faith defense would also limit the operation of any disciplinary mechanism that would be triggered by a determination of liability or settlement by the government;[25] such mechanism would—at least in the view of the current Administration—be activated only when the official had intentionally violated the plaintiff's constitutional rights.[26]

---

[24] 102 S. Ct. 2727, 2736–39 (1982). Defining "[q]ualified or 'good faith' immunity," the Supreme Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 2738. This "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law," *id.* at 2739, supersedes reliance both on objective factors and on subjective factors (*i.e.*, "permissible intentions") in determining whether the official acted in good faith. *Id.* at 2737. Whether the adjustment of the good-faith defense to rely wholly on objective factors will actually reduce the extent of liability for official misconduct, or will simply "permit the resolution of many insubstantial claims on summary judgment," *id.* at 2739, is highly doubtful, for although *Harlow* may have somewhat simplified trial of the good faith issue with respect to the question of unclear applicable law. Other subjective elements certainly remain to be asserted or denied in establishing the official's state of mind. *See, e.g.*, Briggs v. Goodwin, No. 80-2269 (D.C. Cir. Jan. 11, 1983); McSurely v. McClellan, No. 82-2369 (D.C. Cir. Dec. 10, 1982); Dale v. Bartels, No. 74-Civ. 1382-CLB (S.D. N.Y., Dec. 17, 1982); *cf.* Sampson v. King, 693 F.2d 566 (5th Cir. 1982); Saldana v. Garza, 684 F.2d 1159 (5th Cir. 1982); United States v. Irving, 684 F.2d 494 (7th Cir. 1982); Standridge v. City of Seaside, 545 F. Supp. 1195 (N.D. Cal. 1982); Thompson v. Pennsylvania Parole Board Member Jefferson, 544 F. Supp. 173 (E.D. Penn. 1982).

[25] *See* H.R. 7034, § 202 (proposed 28 U.S.C. § 2700); S. 1775, § 5 (proposed 28 U.S.C. § 2679(f)).

[26] To be sure, even if the government were permitted to assert the good-faith defense, the agency that employed the official whose conduct was challenged would theoretically be free to initiate its own internal investigation and disciplinary proceedings under existing law at any time, irrespective of the pendency of the lawsuit. But the current Administration has strongly implied that a determination of liability or money settlement by the United States would be a necessary predicate for disciplinary action against the defendant official. *See 1981 Senate Hearings, supra* note 7, at 9 (testimony of Deputy Attorney General Schmults) (arguing against waiver of good faith on ground that disciplinary proceedings would be triggered by determination of liability, and that where the official has acted in good faith "there should be no disciplinary proceedings").

As initially drafted (in the form of H.R. 24), H.R. 7034 was criticized by some for eliminating the "good-faith" defense in constitutional tort suits. *See 1982 House Hearings, supra* note 1, at 341 (statement of J. Bryan Hyland, President, Association of Federal Investigators); *id.* at 343–45 (statement of Ira M. Lechner, Legislative Counsel, National Association of Police Organizations, Inc.). H.R. 24's original "good faith" waiver was specifically endorsed by, among others, the Federal Executive and Professional Association ("FEPA"), *see id.* at 328 (statement of Richard K. Pelz, President of FEPA), and waiver of the defense under earlier legislative proposals was supported by the FBI, *see 1979 House Hearings, supra* note 4, at 80 (statment of William H. Webster, Director, FBI) and by the Carter Administration, *see 1978 House Hearings, supra* note 1, at 14 (statement of Irving Jaffee, Deputy Assistant Attorney General, Civil Division, Department of Justice), as well as by the American Bar Association, *1979 House Hearings, supra* note 4, at 152 (statement of B. James George, Jr., Immediate Past Chairperson, Criminal Justice Section, American Bar Association).

Because permitting the government to assert the official's good faith would thus undercut the goals of assuring victim compensation and reinforcing official accountability, those who would preserve the good-faith defense for the government in constitutional tort suits bear a heavy burden of justification for their position. The argument advanced in support of retaining the good-faith defense for the government does not meet that burden.

At the outset, it should be understood that under established tort doctrine applicable to every analogous situation of private and public vicarious liability, the United States would not be permitted to invoke the "good-faith" immunity of its officials in constitutional tort suits. At common law, the majority rule in the private employment context is that an employer sued for the tort of an employee under the doctrine of *respondeat superior* may not invoke the employee's immunities.[27] Moreover, the majority common-law rule in the public employment context at the state and local level is that a government agency sued for the tort of a public official under the doctrine of *respondeat superior* may not invoke the official's immunities.[28] Indeed, in FTCA suits, virtually every federal court that has considered the issue has concluded that (a) the doctrine of *respondeat superior* does not permit the United States to invoke the immunities of its officials,[29] and (b) Congress did not intend for the United States to be able to invoke the immunities of its officials in suits for intentional torts brought under 28 U.S.C. § 2680(h).[30]

---

[27] *See, e.g.*, Schubert v. August Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42 (1928); Hallmark Insurance Co. v. Crary Enterprises, Inc., 72 Wis.2d 472, 475, 241 N.W.2d 171, 173 (1976); Restatement (Second) of Agency § 217 Comment b (1958); 2 F. Harper & F. James, The Law of Torts, § 26.17, at 1427 n.6 (1956); W. Seavey, Handbook on the Law of Agency, § 93, at 167 (1964).

[28] *See, e.g.*, James v. Prince George's County, 288 Md. 315, 418 A.2d 1173, 1182 (1980); Maynard v. City of Madison, 101 Wis.2d 273, 304 N.W.2d 163, 169 (1981); Mutnan v. City of Monongahela, 45 Pa. Commw. 23, 406 A.2d 811, 813–14 (1979).

[29] *See* Downs v. United States, 382 F. Supp. 713, 749–51 (M.D. Tenn. 1974), *aff'd in pertinent part*, 522 F.2d 990, 998 (6th Cir. 1975); United States v. Massachusetts Bonding & Insurance Co., 227 F.2d 385, 387 (1st Cir. 1956), *rev'd on other grounds*, 352 U.S. 128 (1958); Ray v. United States, 228 F.2d 574, 585 n.10, 586 n.12 (5th Cir. 1955) (Brown, J., dissenting); United States v. Trubow, 214 F.2d 192, 196 (9th Cir. 1954); Jackson v. United States, 196 F.2d 725, 726 (3d Cir. 1952); United States v. Hull, 195 F.2d 64, 68 (1st Cir. 1952); The only decision *contra* appears to be Brooks v. United States, 152 F. Supp. 535, 537 (S.D.N.Y. 1957) (alternative holding), relying on the premise that common-law *respondeat superior* entitles an employer to invoke his employee's immunities.

[30] Four of the five federal courts to have considered the issue have reached this conclusion. The Fourth Circuit, declining to rely on the common-law doctrine of *respondeat superior*, has held that Congress intended to permit the United States to plead the qualified immunity of its officials in suits under 28 U.S.C. § 2680(h). Norton v. United States, 581 F.2d 390, 393–96 (4th Cir. 1978), *rev'g* 427 F. Supp. 138, 146–52 (E.D. Va. 1977). In addition to the district court in *Norton*, the three other federal courts that have considered the issue have reached the opposite conclusion. *See* Picariello v. Fenton, 491 F. Supp. 1026, 1040–42, (M.D. Pa. 1980); Townsend v. Carmel, 494 F. Supp. 30, 36–37 (D.D.C. 1980); Crain v. Krehbiel, 443 F. Supp. 202, 215–17 (N.D. Cal. 1978). *Cf.* Downs v. United States, 522 F.2d 990, 998 (6th Cir. 1975). *See also* Comment, *Sovereign Immunity*, 47 Geo. Wash. L. Rev. 651 (1979) (criticizing Fourth Circuit's *Norton* decision).

Allowing the United States to plead the "good-faith" immunity of federal officials in constitutional tort suits would not appear to place the United States on a par with employers who face liability under *respondeat superior*.[31] On the contrary, the government would have an advantage enjoyed neither by private nor public employers at common law, nor by the United States itself in non-constitutional tort suits.

The principal argument for retaining the good-faith defense asserts, in essence, that no genuine wrongdoing has occurred where the official has acted in good faith, and that a judgment against the government in such cases would cause an unwarranted imputation of wrongdoing on the defendant official's part.[32]

This argument simply cannot withstand scrutiny. The good-faith defense is made available to the individual government official not because the official's good faith somehow negates the fact of constitutional injury, or because a determination of liability would unfairly stigmatize him. Instead, "underlying the qualified immunity which public officials enjoy for actions taken in good faith is the fear that exposure to personal liability would deter them from acting at all."[33] Thus, although a government official's good faith may be relevant to whether a party whose constitutional rights have been violated should be entitled to compensation from the official, the official's good faith cannot be relevant to whether the victim is entitled to compensation from the government.[34]

---

[31] FBI Director Webster, in fact, has suggested that the apt analogy in this context might be not to *respondeat superior* doctrine at all, but to decisional law denying insurance companies the right to assert the immunities of those whom they have insured. *1978 House Hearings, supra* note 1, at 97.

[32] *See 1982 House Hearings, supra* note 1, at 343–44 (statement of Ira M. Lechner, Legislative Council, Nat'l Ass'n of Police Organizations, Inc.); *id.* at 334 (statement of Ordway P. Burden, President, Law Enforcement Assistance Foundation); *id.* at 138 (statement of Joseph A. Morris, General Counsel, Office of Personnel Management).

Viewed in this light, the good-faith defense is not an excuse for misconduct, but rather a denial that any *injury* has occurred. Thus, Deputy Attorney General Schmults has frankly stated the Administration's view that the good-faith defense:

> [R]eally goes to the merits of the plaintiff's claim by testing the action of an employee against the standard of reasonableness and good faith. . . . [a]nd certainly no employee wants to be found 'guilty,' if you will, of unconstitutional acts and suffer the resulting stigma. So that, even where the United States and not the employee would be the defendant, our view is that employees would be discouraged from acting in uncertain areas where they might subject the Government to financial liability.

1981 Senate Hearings, supra note 7, at 9.

[33] Carlson v. Green, 100 S. Ct. at 1473 n.7, *citing* Butz v. Economou, 438 U.S. 478, 497 (1978); Scheuer v. Rhodes, 416 U.S. 232, 240 (1974). *See* Owen v. City of Independence, 445 U.S. 612 (1980). As FBI Director William H. Webster has stated, the good-faith defense "is for the individual protection of the agent." *1978 House Hearings, supra* note 1, at 97 (testimony).

[34] *See 1979 House Hearings, supra* note 4, at 126–27 (statement of Prof. Bermann); Norton v. United States, 581 F.2d at 398 (Butzner, J., dissenting). As Deputy Attorney General Civiletti testified:

> [T]he good faith defense doesn't mean that the conduct is not regrettable, terribly negligent, that everyone doesn't feel awful remorse about it, and there hasn't been real

As for the claim that a determination of liability absent bad faith would unfairly stigmatize the defendant official, it must be remembered that in such a case the official *did* commit a constitutional injury, even though his conduct may have been unintentional.[35] Surely solicitude for the tortfeasor's reputation cannot be allowed to override his victim's right to compensation. And surely the fact of the tortfeasor's good faith cannot be allowed to remove the basis for disciplining him on grounds other than motive, such as negligence or incompetence. There is no reason why an official should not be held accountable for such misfeasance.[36]

Congress, of course, may specifically provide by legislation that no finding of liability on the government's part in a constitutional tort case shall give rise to any adverse inference as to the official's good faith. Indeed, it would appear sound for Congress to provide that, once the United States has been substituted for an official in a constitutional tort suit, the official shall be free to treat that suit—say, in answering questions of potential creditors, employers, or others—as if he had never been named as a defendant. Congress should specifically

---

> harm or substantial harm, if not physically, to money values or at least to the dignity of the individual and the privacy of the individual.
>
> I will give you a quick example. Investigators, three of them, go to a home of suspects looking for racketeering—numbers, or whatever. When they go in the home and they are queried about it later, each one says he thought the other had a search warrant. None of them had a search warrant.
>
> They find a man and woman 75 years old in there. They take the woman and strip the woman down and do cavity searches and whatever—in the wrong home.
>
> That is not a gift when your are talking about compensation for that kind of wrong under the fourth amendment.

1979 House Hearings, *supra* note 4, at 19.

[35] *See supra* note 29. As Deputy Attorney General Civiletti pointed out in his testimony, *id.*, the good-faith defense is applicable not only when the relevant law was unclear or not yet established, but when other circumstances may have operated to render a violation of constitutional rights unintentional or unknowing. Moreover, in the context of common-law torts, to excuse a wrong it is ordinarily not enough a show that the relevant law had not previously been declared.

[36] Public Citizen criticized H.R. 7034 for its original *limited* retention (in H.R. 24) of the good-faith defense with respect to the conduct of Members of Congress, judges, prosecutors, or others performing analogous functions. *1982 House Hearings*, *supra* note 1 at 357–58 (statement of Alan B. Morrison, Director of Litigation, Public Citizen). Presumably, new legislation proceeding along those lines would now provide for retention of the defense with respect to the conduct of the President as well. *See* Nixon v. Fitzgerald, 102 S. Ct. 2690, 2705 (1982). Nevertheless, there would appear to be some merit to Mr. Morrison's contention that ''all the reasons that lead to the elimination of the good faith defense in all other situations apply here.'' *1982 House Hearings*, *supra* note 1, at 357 (Morrison statement). If the concern is to spare such officials the ordeal of administrative proceedings in the event that liability is established, future legislation might be drafted to bar any administrative investigation or proceeding against such officials upon a showing that an otherwise available immunity could have barred recovery in a given case in which liability was found. The power of Congress to abrogate the absolute or qualified immunity of any federal official, even without transferring liability to the United States, seems clear. *See* Nixon v. Fitzgerald, 102 S. Ct. at 2719 n.27.

provide that the defendant official is entitled to assert a good-faith defense in any administrative investigation or disciplinary proceeding under the bill.[37]

Apart from the respects in which waiver by the government of the good-faith defense would vindicate the goals of compensation and deterrence, waiver of the defense would also operate to limit discovery and facilitate the disposition of claims.[38] As Elliot Richardson, otherwise a proponent of good-faith immunity, has noted, "retention of the good faith defense [would] cause federal officials to continue to be enmeshed in years of pre-trial depositions and document discovery aimed at determining the state of mind of an official."[39] Reducing constitutional tort suits to these two issues—did a violation of the plaintiff's constitutional rights occur, and was that injury caused by a government official acting within the scope of his office or employment—would dramatically simplify trials, and encourage early settlement.[40]

One other argument is sometimes advanced in favor of retaining the good-faith defense for the government in constitutional tort suits—namely, that waiver of the defense would enable plaintiffs to "prevail more easily, thereby increasing economic costs to the [g]overnment."[41]

---

[37] H.R. 7034, § 202 (proposed 28 U.S.C. § 2700). As Deputy Assistant Attorney General Jaffe noted in connection with legislation supported by the Carter Administration, "in any disciplinary proceeding, the good faith of the employees will be very much an issue, and if [a defendant employee] can establish that he had a good faith belief that what he was doing was lawful and proper, then disciplinary proceedings on that basis would not proceed." *1978 House Hearings, supra* note 1, at 14.

[38] As the Justice Department observed in commenting on the cost impact of earlier legislation providing for waiver of the good-faith defense:

> Major discovery savings would . . . accrue to the agencies and departments employing those individuals who have been sued. Currently, the burden on an agency can be immense. The FBI, for example, has had to examine hundreds of thousands of documents in connection with suits against individuals. In addition to the savings associated with the discovery process, simplification of the issues involved in a constitutional tort action will reduce the amount of attorney time necessary for each case.

1979 House Hearings, supra note 4, at 13 n.1 (Department of Justice Memorandum of May 7, 1979).

Although Harlow v. Fitzgerald may have somewhat simplified trial of the good-faith issue with respect to the question of unclear applicable law, *see supra* note 24, other subjective elements would certainly remain to be asserted or denied in establishing an official's state of mind, and thus the problem of discovery would continue to plague constitutional tort suits where the good-faith defense could otherwise be raised.

[39] 1982 Senate Hearing, *supra* note 1, at 125. Mr. Richardson appeared to suggest that this problem should be treated by removing the subjective element from the good faith test, *Id.*, as the Supreme Court did in *Harlow* with respect to unclear applicable law.

[40] The strength of the official's good-faith defense has been an important element in settlement discussions. *1982 House Hearings, supra* note 1, at 251 (testimony of Royce C. Lamberth, Chief, Civil Division, Office of the U.S. Attorney for the District of Columbia). Whatever the impact of *Harlow* on the discovery involved whenever the good-faith defense is asserted, *see supra* note 38, the assertion of the good-faith defense may be expected frequently to postpone settlement pending appellate review of a district court's ruling on summary judgment for either party with respect to the so-called "objective" factors upon which the good-faith defense must now rely.

As to this argument, it must be observed at the outset that any increased cost to the government by virtue of its expanded liability will at least partially be offset by the litigation savings that would result from simplification of the issues,[42] and the incentive for early settlement.[43] And certainly the "economic costs to the government" may be moderated by setting liquidated damages in a reasonable amount.[44] But there is a deeper, more fundamental reason for allowing recovery notwithstanding cost. As the current Administration has forthrightly declared:

> [W]here someone has a genuine grievance—where someone has a genuine claim that he has been deprived of a constitutional right—we ought to afford him avenues of relief without regard to cost. We cannot put a price on constitutional liberties.[45]

If a constitutional injury has occurred, redress should not be denied.

(b) The Search for an Effective Substitute Deterrent

As noted above, a key source of dissatisfaction with the existing system of civil sanctions is its supposed "overdeterrent" effect—*viz.*, that the threat of personal liability (or, at a minimum, the risk of being sued) deters not only improper conduct by government officials, but proper conduct as well.[46] On the other hand, the *Bivens* remedy has been made available precisely because, standing alone, the remedy of suing the United States "is not a sufficient protector of the citizens' constitutional rights."[47]

Indeed, in stressing the salutary deterrent function served by the threat of personal liability—including punitive damages—the Supreme Court has specifically emphasized "the doubt cast on the validity of the assumption that there exist adequate mechanisms for disciplining federal employees" who violate constitutional rights.[48] The Court has implied that the threat of disciplinary action under existing mechanisms is, at most, a supplement to, and not a substitute for, the deterrence imposed by the risk of personal liability.[49]

---

[41] *1982 House Hearings, supra* note 1, at 138 (statement of Joseph A. Morris, General Counsel, Office of Personnel Management (OPM)).

[42] *See supra* note 38.

[43] *See supra* note 40.

[44] As noted above, liquidated damages under H.R. 7034 would have been set at the greater of $2,000 or, in the case of a continuing violation, $200 per day for each such violation. *See supra* note 12. Liquidated damages under S. 1775 would have been set at the greater of $1,000 or, in the case of a continuing violation, $100 per day for each day up to a maximum of $15,000. S. 1775, § 3 (proposed 28 U.S.C. § 2674(b)(2)).

[45] *1982 House Hearings, supra* note 1, at 141 (statement of Joseph A. Morris, OPM) (arguing that possibility of increased damage awards by virtue of substitution of government as defendant in constitutional tort suits is worth risking).

[46] *See supra* note 2.

[47] Carlson v. Green, 100 S. Ct. at 1474.

[48] *Id.* at 1473 & n.8, *citing 1978 House Hearings, supra* note 1, at 6 (statement of Attorney General Bell). As the existence of the exclusionary rule demonstrates, existing mechanisms of deterrence have not been deemed sufficient to deter Fourth Amendment violations. *See* Mapp v. Ohio, 367 U.S. 634 (1961). If the Supreme Court should eventually adopt a "good faith" exception

One basic question, then, in replacing the existing system of civil sanctions with a system of "enterprise liability" is how to assure that the substitute deterrent mechanism will equally serve the goal of measured deterrence.

The approach taken in H.R. 7034 and S. 1775 was one of bare reliance on existing mechanisms. The two bills, as noted previously, provided that, when there has been a judgment against or money settlement by the United States, the Attorney General "shall forward the matter for such further administrative investigation or disciplinary action as may be appropriate" to the head of the defendant official's department or agency.[50]

This provision was criticized by many for failing to offer an adequate substitute for the deterrence function of the existing system of civil sanctions—in marked contrast to earlier proposals, whose somewhat cumbersome provisions for administrative action upon determination of liability, and for judicial review

---

to the exclusionary rule, the Court may well signal Congress that additional, substitute mechanisms of deterrence are needed. *See* Transcript of Oral Argument in Illinois v. Gates, No. 81- 430 (Feb./Mar., 1983) (question of Justice Stevens during Reargument).

[49] Carlson v. Green, 100 S. Ct. at 1473. Much of the doubt about the efficacy of existing mechanisms of accountability is attributable to the law enforcement and intelligence agency abuses revealed during the last decade. *See 1979 House Hearings, supra* note 4, at 45 & n.32 (Statement of Karen Christensen, Legislative Counsel, American Civil Liberties Union). *See also* "Prosecution for Domestic Spying Rejected in 1977," *New York Times*, Mar. 15, 1982, at A12, col. 1 (describing contents of 1976 report by Justice Department acknowledging apparent violation of "fundamental constitutional rights" by federal agencies and officials, but recommending against criminal prosecution); Association of the Bar of the City of New York, Committee on Civil Rights, *Intelligence Agency Abuses: The Need for a Temporary Special Prosecutor*, 31 Rec. A.B. City N.Y. 601 (1976); U.S. Department of Justice, *Report Concerning Investigation and Prosecutorial Decisions with Respect to Central Intelligence Agency Mail Opening Activities in the United States* (1977).

One witness noted in hearings on H.R. 2659 the Federal Bureau of Investigation's administrative inquiry into illegal investigative activities directed against the Weather Underground:

> In April, 1979 the Department of Justice Office of Professional Responsibility informed FBI Director William Webster that it had evidence of 32 illegal surreptitious entries, 17 illegal wiretaps, 2 unauthorized microphone installations, and numerous illegal mail openings conducted against relatives and associates of Weather Underground members. After eight months of review, the Director informed the Attorney General that of the 61 special agents and 7 supervisors implicated in these illegal activities, disciplinary action was appropriate for only 2 agents and 4 supervisors. Ultimately, only mild sanctions were applied to the six employees. Letter from William H. Webster, Director, Federal Bureau of Investigation to Attorney General Griffin B. Bell at 1 (Dec. 5, 1978). Two street agents were 'censured,' meaning that they merely received a letter which identifies a deficient act or omission and calls for proper conduct in the future. Of the [four] supervisors, two were 'recommended for dismissal,' one was demoted and the fourth was suspended for 30 days without pay. Dismissal does not affect vested retirement or pension rights.

1979 House Hearings, supra note 4, at 45 & n.2 (statement of Karen Christensen, ACLU) (text and footnotes conjoined).

[50] H.R. 7034, § 202 (proposed 28 U.S.C. § 2700); S. 1775, § 5(c) (proposed 28 U.S.C. § 2679(f)).

of such action, may well have accounted for that legislation's failure to be adopted.[51]

Plainly some middle ground must be found. An administrative mechanism that depends on an agency's inclination to repudiate the conduct of its officials can scarcely be expected to foster public confidence that errant officials will either be made to account for their actions, or will be effectively dissuaded from future misconduct.[52] On the one hand, an agency may be reluctant to punish officials who have committed wrongful acts in the belief that "they were doing their duty to their country and to their agency."[53] At the same time, however, internal proceedings may afford agency officials an opportunity to use the defendant official as a scapegoat for their own wrongdoing, or to punish him for bringing their misconduct to light in the course of the proceedings.[54] Indeed, there is good reason to suppose that administrative proceedings arising from constitutional torts will frequently involve claims implicating agency policy or policymakers in the defendant official's misconduct,[55] and thereby compromise the agency's impartiality.[56]

Thus, with sound reason, the Federal Executive & Professional Association has urged that "the proceeding . . . not be conducted by the head of the agency in which the employee or employees work," but rather that an independent agency be designated for that purpose.[57] Remitting administrative action to such an independent body would, by declining to rely solely for discharge of disciplinary responsibilities on those with the most incentive to misuse it, presumably meet at least some of the concerns of the previous Administration and such groups as Public Citizen, which had argued for victim participation in independent disciplinary proceedings as "essential" to any "meaningful substitute" for the existing mechanism of actual and punitive damages.[58]

---

[51] *See* S. 3314, *supra* note 5, § 13; H.R. 2659, *supra* note 5, § 8; S. 695, *supra* note 5, § 12(a). H.R. 2659 and S. 695 were Carter Administration proposals.

[52] The concerns expressed go beyond the law enforcement and intelligence context. Thus Senator Metzenbaum stated, to Attorney General Bell's expression of assent, that:

> [I]n the case of employees [accused of wrongdoing], you have to have some kind of a review board that is totally unresponsive to the agency that is itself involved in the alleged wrongdoing. Or else the person who claims to have been wronged will never feel that they got justice; and probably the American people, when they learn about it, will not think they got justice. It will always be suspect—whether it is the CIA investigating its own people, or Cointel, or whether it is HEW or any other agency.

1978 Senate Hearing, supra note 4, at 13.

[53] *1979 House Hearings, supra* note 4, at 127 (remarks of Rep. McClory).

[54] *Id.*

[55] *Id.* Indeed, U.S. Attorney Harris specifically cited the tendency of defendant officials to plead that they were only "following . . . orders." *1982 House Hearings, supra* note 1, at 242.

[56] *See supra* notes 46 & 51.

[57] *1982 House Hearings, supra* note 1, at 330–31 (statement of Richard Pelz of FEPA).

[58] *1982 House Hearings, supra* note 1, at 361 (statement of Alan B. Morrison); *see 1978 Senate Hearing, supra* note 4, at 6 (statement of Attorney General Bell) (advocating "procedures in which the injured person can participate in a meaningful way"). In its testimony on H.R. 24, Public Citizen called for:

One approach along these lines would be to establish, for independent investigation and, in appropriate cases, prosecution of disciplinary proceedings, an Office of Disciplinary Counsel modeled on the existing Office of Special Counsel under the Civil Service Reform Act of 1978.[59] Another approach—one advocated by the Federal Executive & Professional Association (''FEPA'')—would be to utilize the Merit Systems Protection Board (''MSPB'') itself as a disciplinary body.[60] As the FEPA observed, the Special Counsel himself is already authorized to investigate abuses of authority in the context of prohibited personnel practices.[61]

Thus Congress could specifically require the Special Counsel to investigate constitutional tort cases in which there had been judgment of liability or money compromise by the government, and direct the prosecution of such cases, when appropriate, before the Merit Systems Protection Board. No judicial determination in the constitutional tort suit would be binding on the defendant official in proceedings before the Merit Systems Protection Board, and the defendant official could assert that all defenses that would have been available to him had he been a party to the constitutional tort suit under the old system of civil sanctions.[62]

---

(1) the right of the victim to initiate an administrative investigation which cannot be terminated without adequate reasons;
(2) the right of the victim to participate in an appropriate manner in the investigation and subsequent disciplinary proceedings, if any; and
(3) the right of the victim to agency, and ultimately judicial, review if no punishment is meted out, or if the punishment is wholly inadequate for the violation.

1982 House Hearings, supra note 1, at 361 (statement of Alan B. Morrison). These recommendations were incorporated in legislation supported by the previous Administration. *See* Bell, *supra* note 4, at 12–13.

[59] Act of Oct. 10, 1978, Pub. L. No. 95-367 § 202, 92 Stat. 1111 (codified at 5 U.S.C. § § 1201–1209). This option—establishing an Office of Disciplinary Counsel—was proposed by the Fund for Constitutional Government. *See 1979 House Hearings, supra* note 4, at 74.

[60] *1982 House Hearing, supra* note 1, at 311 (testimony of Richard K. Pelz), *citing* 5 U.S.C. § 1207 (authorizing MSPB to impose disciplinary sanctions). The MSPB is authorized, *inter alia*, to hear and adjudicate allegations of prohibited personnel practices, 5 U.S.C. § 1205(a), and to enforce compliance with its orders by any federal agency or official. *Id.* § 1205(a)(2). Compliance may be enforced by orders that salary payments be withheld pending compliance. *Id.* § 1205(d)(2).

[61] *1982 House Hearing, supra* note 1, at 311 (testimony of Richard Pelz, FEPA), *citing* 5 U.S.C. § 1207. Chapter 12 of Title 5 of the United States Code, 5 U.S.C. §§ 1201–1209—pertaining to the Merit Systems Protection Board and Special Counsel—are reproduced in Appendix A-2.

The Special Counsel is currently authorized to receive and investigate allegations of ''prohibited personnel practices.'' 5 U.S.C. § 1206(a)(4). If the Special Counsel determines that there is ''a substantial likelihood . . . [of] a violation of any law, rule, or regulation, or mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to the public health and safety,'' *id.* § 1206(a)(3)(A), the Special Counsel may under certain circumstances require the agency head to conduct an investigation and submit a written report. *Id.* § 1206(a)(3)(B). The Special Counsel may recommend as to what corrective action should be taken, if any, *id.* § 1206(c)(1)(A), and, if the agency has not taken the corrective action recommended, the Special Counsel may request that the MSPB order such corrective action. *Id.* § 1206(c)(1)(B).

[62] Whatever one's view of any particular option for establishing an administrative mechanism with ''teeth,'' it cannot be the case that ''permitting the alleged [sic] tort victim to have a say in the disciplinary proceedings will 'wipe out' the protection sought to be given [by the new system]

The agency that employs the official whose conduct has been challenged would, of course, continue to be responsible in the first instance for investigating and, where appropriate, disciplining the official or implementing other corrective steps even prior to the outcome of the constitutional tort suit against the government. Existing disciplinary mechanisms are directed toward conduct related to job performance and are designed to promote administrative efficiency. It would be desirable for Congress to provide explicit authorization for applying existing disciplinary mechanisms to official misconduct.

Congress could also provide that, before proceeding with disciplinary action against any official for a constitutional tort, the Special Counsel shall determine whether the agency that employs the official has already acted, and, if so, whether the agency's action is satisfactory from the standpoint of the system's overall goals of deterrence and accountability.

The Special Counsel would initiate disciplinary proceedings before the MSPB only if he determined that the agency that employed the official had taken no action, or that the agency's action was insufficient; any discipline later imposed by the Merit Systems Protection Board would be reduced by any discipline imposed by the agency in its own proceedings. The Special Counsel would annually compile and forward to the House and Senate Judiciary Committees a report setting forth the cases he has reviewed, explaining with particularity why he chose to proceed or not to proceed with independent action in each case.

(c) Jury Trial and ''Additional'' Damages

In rejecting the argument that the Federal Tort Claims Act provides as effective a remedy as *Bivens*-type actions, the Supreme Court has specifically stressed the availability of punitive damages and the option of a jury trial in *Bivens* suits.[63] As the Court noted:

> Punitive damages are 'a particular remedial mechanism normally available in the federal courts,' *Bivens*, 403 U.S. at 397, and are especially appropriate to redress the violation by a government official of a citizen's constitutional rights. Moreover, punitive damages are available in 'a proper' § 1983 action, *Carey v. Piphus*, 435 U.S. 247, 257 n.11 (1978) (punitive damages not awarded because district court found defendants 'did not act with a malicious intention to deprive respondents of their rights or to do them [some] other injury'), and *Butz v. Economou, supra,* suggests that the 'constitutional design' would be stood on its head if federal officials did not face at least

---

and place the employee in a very tenuous position.'' *1978 House Hearings, supra* note 1, at 32 (statement of John S. McNerney, National President, Federal Criminal Investigators Association). It is difficult to see how authorizing the Special Counsel to act on the victim's complaint, for example, or to summon the victim to appear as a witness, would place the defendant official at any unfair disadvantage. In any event, even under existing administrative mechanisms, the victim of alleged misconduct may trigger an investigation. *See, e.g.*, 5 U.S.C. § 1206.

[63] Carlson v. Green, 100 S. Ct. at 1473–74. Jury trial is currently provided under the FTCA only in civil actions against the United States for the recovery of internal revenue taxes erroneously of illegally assessed or collected, penalties collected without authority, or any other sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws. 28 U.S.C. § 2402.

> the same liability as state officials guilty of the same constitutional transgression. 438 U.S. at 504. But punitive damages in an FTCA suit are statutorily prohibited. 28 U.S.C. § 2674. Thus FTCA is that much less effective than a *Bivens* action as a deterrent to unconstitutional act.[64]

The Court noted that "after *Carey* punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury."[65] (Such a problem, of course, would not arise under legislation providing—as did H.R. 7034 and S. 1775—for liquidated as well as actual damages.)

With respect to the argument that juries have been biased against *Bivens* defendants, the Court answered that no suggestion had been made that judges would be more receptive, and the Court noted further that no explanation had been given for "why the plaintiff should not retain the choice."[66] In view of the minute number of recoveries by plaintiffs in *Bivens* suits,[67] the concern about jury bias appears to be wholly misplaced. To be sure, however, juries may be more ready to award punitive damages against the government than against individual *Bivens* defendants. But any legitimate concern about the risk of excessive jury awards should be met by setting a ceiling on the amount of punitive damages that may be awarded for a constitutional tort committed with malice, and not by denying such damages altogether, or by denying the plaintiff the right to a jury trial.

Needless to say, such damages are more properly cast as "additional" or "exemplary" than as "punitive" damages. For the object of assessing such damages against the government is not to punish the sovereign, but to express sharp social disapproval of constitutional torts committed with malice, and to spur the government with special force to minimize the possibility that such malicious conduct will recur.[68] As FEPA has noted:

> [T]he lawsuit is not simply a device to recompense the injured party for the damages which he or she may have suffered at the hands of Federal employees who have overstepped the bounds of their authority, in certain

---

[64] *Id.* at 1473–74.

[65] *Id.* at 1473 n.9.

[66] *Id.* at 1474.

[67] According to Deputy Attorney General Schmults, "several thousand" constitutional tort actions had been filed as of November 1981, but only nine had eventuated in money judgments against federal employees. *1982 Senate Hearings, supra* note 7, at 23. *See* Bell, *supra* note 4, at 2 n.5 (listing 7 cases in which money judgments had been entered for plaintiffs in Bivens actions). The number of cases settled by the defendant official is unknown.

[68] In holding on policy grounds that municipalities ought not to be liable for punitive damages under 42 U.S.C. § 1983, the Supreme Court emphasized the availability of punitive damages against the offending official. City of Newport v. Fact Concerts, Inc., 101 S. Ct. 2748, 2761 (1981). "In our view," the Court stated, "this provides sufficient protection against the prospect that a public official may commit recurrent constitutional violations by reason of his office." *Id.* Under a system of federal enterprise liability that would make the United States exclusively liable for constitutional torts, of course, the availability of punitive damages against an offending official could not be relied upon to "directly advance[ ] the public's interest in preventing repeated constitutional violations." *Id.*

> cases. There is more involved than simple . . . compensation. At issue are alleged deprivations of basic and precious individual rights guaranteed by our constitution, particularly in the Bill of Rights. The litigation becomes an opportunity for the public through the voice of the court to make a statement that the abuse of authority was so unjustified as to threaten the basic principles of a responsive and responsible government in a democratic society. The award of punitive damages would make such a statement. . . . [Moreover,] the Attorney General in settling a suit [should be allowed] to agree to punitive damages, which would constitute a statement on his part that the action of the Federal employee or employees transcended the bound[s] of acceptability and excuse.[69]

Insofar as the goal of "additional" damages would serve such a function, allowing such damages to be assessed would complement the Special Counsel procedures outlined above.[70]

Even more fundamentally, allowing additional damage awards against the United States in appropriate cases may be constitutionally *required* by the principle that Congress may not strip the federal judiciary of the power to fashion remedies as deemed necessary to enforce constitutional rights.[71] Whether the right to jury trial in constitutional tort cases may be eliminated would presumably depend, at least in part, on the credibility of the requisite congressional declaration that the new non-jury trial remedy would be "equally effective" as the existing jury trial remedy.[72]

Of course, allowing malice to be placed in issue at trial may entail some sacrifice of the litigation economies achieved by waiver of the good-faith defense. But such economies would not altogether be eliminated, since at least the good-faith issue itself would have been placed beyond trial, and, as noted above, there are sound reasons for doing that, independent of litigation savings. Moreover, the expense of litigating allegations of malice can be expected, at least until experience proves otherwise, to discourage their frivolous assertion.[73]

---

[69] *See 1982 House Hearings, supra* note 1, at 328–29 (statement of Richard K. Pelz).

[70] *See supra* pp. 4-26 to 4-29.

[71] *See 1981 Senate Hearings, supra* note 7, at 25–6 (Neuborne statement). *Cf.* Jacobs v. United States, 290 U.S. 13, 16–17 (1933) (per Hughes, C.J.) (notwithstanding lack of statutory provision for award of interest on amount of loss caused by taking, constitutional requirement of just compensation held to require inclusion of interest in damage award; "the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such an allowance was appropriate in order to make the compensation adequate."). *See generally* Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 Harv. C.R.-C.L. L. Rev. 129 (1981); Saeger, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17 (1981).

[72] Carlson v. Green, 100 S. Ct. 1468, 1472 (1980). To be sure, H.R. 24, § 3, declares that the exclusive remedy against the United States "shall be deemed an equally effective substitute for any recovery against any employee of the United States for tort claims arising under the Constitution." Although the Supreme Court in *Carlson* stated that a *Bivens*-type action *may* be defeated by such a declaration, 100 S. Ct. at 1472, the validity of the declaration itself would surely be subject to judicial review. It is far from certain that a mere *ipse dixit* by Congress would survive review.

(d) Attorney Fees

As noted above, H.R. 7034, but not S. 1775, provided that a prevailing plaintiff (*i.e.*, one who has won a judgment, or received a cash settlement from the government) would be entitled to "a reasonable attorney's fee and other litigation costs reasonably incurred, including attorney fees or costs attributable to processing [the initial] administrative claim. . . ."[74] This provision, too, has been a source of controversy.

Thus, on the one hand, the Association of Federal Investigators and the SEC favored eliminating attorney fees altogether, arguing that the possibility of such fees would only encourage litigation and, even worse, induce "artful pleading" by lawyers to set forth constitutional rather than non-constitutional tort claims whenever possible.[75] On the other hand, the same considerations that support awarding attorney fees under 42 U.S.C. § 1988 in cases of proven violations of constitutional rights would seem to apply here as well. Inasmuch as the attorney fee issue raises questions that go far beyond the constitutional tort context, however, any recommendation on the issue would be beyond the scope of this report.

(e) Torts of Former Officials

Although H.R. 7034 and S. 1775 appeared to cover claims for acts or omissions of former government officials committed while such officials were in government service, the bills provided no administrative mechanism for bringing former officials themselves to account. Under H.R. 2659, a Carter Administration bill, former officials could elect either to be sued individually after leaving government service, or to have the government substituted in their place. In choosing the latter, the former official would have agreed to submit to a disciplinary proceeding that could have resulted in a fine equal to as much as one-twelfth of the annual salary earned at the time the act or omission occurred.[76] Whatever one may think of the specific remedy authorized by H.R. 2659, it would seem wholly anomalous to place beyond accountability officials who had left government service before a determination of liability.

(f) "Scope of Office" versus "Color of Law"

A serious issue is presented by the Attorney General certification requirement under H.R. 7034 and S. 1775. First, as a matter of public policy it would appear advisable to replace the "scope of office or employment" criterion with the broader requirement of "color of law," tracking the criterion of liability applicable to state and local officials under 42 U.S.C. § 1983.[77]

---

[73] To minimize the discovery burden if punitive damages are made available, the trial might proceed in two stages, in the first determining liability, and in the second—involving discovery on the issue of malice—following the first only if liability is established.

[74] H.R. 7034, § 202 (proposed 28 U.S.C.§ 2697(a)).

[75] *1982 House Hearings*, *supra* note 1, at 341 (statement of J. Brian Hyland); *id.* at 284 (statement of SEC); *see id* at 258 (statement of William H. Taft IV, General Counsel, Department of Defense).

[76] *See 1979 House Hearings*, *supra* note 4, at 81 (statement of FBI Director Webster) (praising former official provision as "fair and worthwhile").

By expanding the circumstances under which constitutional violations would be judicially cognizable, such a substitution would obviously enable an enterprise liability system to promote even more effectively its twin goals of assuring victim compensation and deterring official misconduct. As Professor Bermann has testified, this approach:

> [I]s more consistent with the values of full compensation and loss-spreading for injuries somehow connected with governmental action. It would more effectively relieve the official of the prospect of personal litigation and liability, which is one of the chief purposes behind H.R. 2659. Finally, it would often avoid the necessity of premature threshold determinations on the question whether the employee was acting within the scope of his authority or solely under color of office. Both in terms of its relevance and its feasibility, this determination is best left to the disciplinary phase of the affair.[78]

Nevertheless, before exposing the United States to such liability—vastly greater than under the *Bivens* doctrine—prudence counsels a more limited experiment, establishing liability of the United States only where an official has committed a constitutional tort within the scope of his office or employment.

(g) The Problematic Distinction Between Constitutional and Non-constitutional Torts

The distinction between constitutional and non-constitutional torts—a distinction that would have been enshrined in both H.R. 7034 and S. 1775[79]—is significant insofar as the *Bivens* remedy against individual government officials provides plaintiffs with rights not afforded plaintiffs in FTCA suits against the government—to wit, the right to jury trial and punitive damages.[80] In addition, the right of a successful plaintiff to attorney fees in constitutional tort cases—by analogy to 42 U.S.C. § 1988—is also recognized in some legislative proposals to replace the *Bivens* remedy but is not currently afforded a successful plaintiff under the FTCA.[81]

---

[77] This was the approach embodied by H.R. 2659, *supra* note 4, the Carter Administration bill, *see 1979 House Hearings*, *supra* note 4, at 8 (statement of Deputy Attorney General Civiletti); *1978 Senate Hearings*, *supra* note 4, at 39–40 (S. 2117), as well as by eariler legislative proposals. *See* S. Rep. No. 588, *supra* note 22, at 34; S. Rep. No. 755, *supra* note 4, at 337–38.

[78] *1979 House Hearings*, *supra* note 4, at 124. Under H.R. 7034 and S. 1775, an individual government official would remain personally liable for constitutional misconduct committed outside of the scope of his office or employment, but under color of law. These bills do not, and could not, purport to provide an "equally effective" substitute for the existing system of treating such misconduct. Bivens v. Six Unknown Named Agents, 403 U.S. at 397.

[79] *See supra* note 11.

[80] *See* Carlson v. Green, 101 S. Ct. at 1473–74.

[81] *See, e.g.*, H.R. 7034, § 202 (proposed 28 U.S.C. § 2698(a)). *Cf.* Lauritzen v. Secretary of the Navy, No. CV 81-879 (AWT) (C.D. Cal., Sept. 9, 1982) (available Oct. 15, 1982, on LEXIS, Genfed library, Dist. file) (holding that successful *Bivens* plaintiff may recover attorney fees from the United States under § 204(a) of the Equal Access to Justice Act, 28 U.S.C. § 2412).

The availability of such "extra" rights has been understood to render the *Bivens* remedy "more effective" than the FTCA remedy.[82] Undoubtedly for this reason, the distinction is maintained in proposed legislation to replace the *Bivens* remedy. The alternative to maintaining the distinction would be either to extend such "extra" rights to non-constitutional suits, or to eliminate them from "constitutional" tort suits.[83]

The practical problem entailed by the distinction, of course, is its natural tendency to encourage "skillful counsel [to] plead the existence of a constitutional tort when their case in reality sounds in a traditional, common law cause of action."[84] If the distinction is to be maintained in any legislation replacing the *Bivens* remedy—as this report recommends it ought to be—Congress should make clear in the legislative history its intention that the courts be alert to the possibility of such skillful pleading, and decide a plaintiff's entitlement to the special advantages of pleading constitutional torts "based on the true gravamen of the tort as alleged and proven."[85]

B. Recommendation

Under current law, individual federal officials may be held personally liable for constitutional violations they are found to have committed while acting within the scope of their office or employment. Damages may not be recovered against the United States for violations of constitutional rights as such, although claims arising out of the same conduct may sometimes be stated against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–80.

There is nearly universal agreement that the existing system of civil sanctions for constitutional violations by federal officials neither provides adequate assurance of compensation for victims of such violations, nor affords the degree of measured deterrence required to discourage improper conduct by government officials without discouraging proper conduct as well. In addition, the federal government often has interests at stake in constitutional tort litigation involving its officials which cannot adequately be represented by the individual official as defendants.

RECOMMENDATION

To serve the primary goals of compensation, deterrence, and fairness in dealing with constitutional torts committed by federal officials, and to afford a solution to the problems perceived to flow from the current system of individual liability, Congress should enact legislation providing that the United States shall be exclusively liable for damages for torts arising under the Constitution of the

---

[82] Carlson v. Green, 101 S. Ct. at 1473.

[83] *Compare 1979 House Hearings*, *supra* note 4, at 41 (statement of Karen Christensen, ACLU) (urging extension of such rights to non-constitutional tort suits) *with 1982 House Hearings*, *supra* note 1, at 284 (statement of SEC) (urging elimination of such rights in constitutional tort suits).

[84] U.S. Department of Justice, *Section-by-Section Analysis of S. 695*, at 8 (1979).

[85] *Id.*

United States and committed by federal officials while acting within the scope of their office or employment.

Such legislation should provide:

(1) That, in constitutional tort actions, the United States may not assert as a defense the absolute or qualified immunity of the official whose conduct gave rise to the claim, or his reasonable good-faith belief in the lawfulness of his conduct. Such immunities, and the good-faith defense, have been judicially created for policy reasons to assure that exposure to personal liability shall not deter individual officials from the vigorous discharge of their responsibilities, and serve no purpose when the government is substituted as defendant other than to limit the extent to which genuine victims of constitutional injuries may secure redress. In providing that the United States shall not assert such immunities or the good-faith defense, Congress may wish to provide that the United States shall be permitted to assert any applicable immunities of the President, and, perhaps, of federal judges and members of Congress.

(2) That there shall be vested in an office of the Executive Branch independent authority to investigate constitutional tort cases in which there has been a judgment of liability against or money compromise by the United States, and that such office shall be vested with independent authority to conduct disciplinary proceedings in such cases as may be appropriate. Such a disciplinary mechanism is essential to perform the deterrent and corrective functions now served by the damage action remedy against individual government officials; existing administrative disciplinary mechanisms, by themselves, are neither directed toward nor capable of performing these functions under current law.

(a) One approach for implementing this recommendation would be to establish an Office of Disciplinary Counsel to investigate and, where appropriate, to prosecute official misconduct before an administrative tribunal independent of the agency that employed the offending official. Another approach would be to augment the existing authority and responsibilities of the Office of Special Counsel and the Merit Systems Protection Board under 5 U.S.C. §§ 1201–09 to perform the functions described herein.

(b) If Congress should choose to rely on the Office of Special Counsel and the Merit Systems Protection Board in implementing this recommendation, separate mechanisms would nevertheless be required to provide for independent investigation and disciplinary proceedings with respect to federal officials not subject to the jurisdiction of the Office of Special Counsel and the Merit Systems Protection Board.

(c) Notwithstanding the authority of the independent disciplinary mechanism utilized to implement this recommendation, the agency that employed the offending official would be responsible in the first instance for investigation and, where appropriate, for disciplining the official or implementing other corrective steps, and such action should not be postponed pending the outcome of any constitutional tort suit that may be filed against the United States. Congress should provide every federal agency with explicit statutory authority to employ existing administrative mechanisms for disciplining officials found to have violated constitutional rights.

(d) Before proceeding with disciplinary action against any official for a violation of constitutional rights, the Disciplinary Counsel or Special Counsel should determine whether the agency that employed the official has already taken disciplinary or other corrective action, and, if so, whether the agency's action is satisfactory from the standpoint of the system's overall goals of deterrence and accountability. The Disciplinary Counsel or Special Counsel would be authorized to initiate disciplinary proceedings before the Merit Systems Protection Board or other independent administrative tribunal only if he determined that the agency that employed the official had taken no disciplinary or other corrective action, or that the agency's action was insufficient. Any discipline later imposed by the Merit Systems Protection Board or other independent administrative tribunal would be reduced by any discipline imposed by the agency in its own proceedings.

(e) The Disciplinary Counsel or Special Counsel should be directed to compile and forward to the House and Senate Judiciary Committees periodic reports setting forth the cases he has reviewed, and explaining with particularity why he chose to proceed or not to proceed with independent disciplinary action in each case.

(3) That Congress should provide not only for actual damages but for reasonable liquidated damages in the event that the actual damages are nominal or nonexistent because the injury caused by the violation of a constitutional right is of an intangible nature. Congress should also consider allowing "additional" damages against the United States in cases where the conduct giving rise to the tort was undertaken with the malicious intention to cause a deprivation of constitutional rights or with reckless disregard for the plaintiff's constitutional rights.

(4) That the right to jury trial should be retained for plaintiffs whose claims had arisen as of the effective date of the legislation implementing this recommendation, and that Congress should consider extending the jury trial right to plaintiffs whose claims arose subsequent to the effective date of the legislation.

(5) That Congress consider the appropriateness of allowing attorney fees under such legislation in the context of a more comprehensive review of the attorney fee issue in federal legislation across-the-board.

(6) That legislation implementing this recommendation provide a mechanism for holding former government officials accountable for constitutional torts committed while they were in office, where a plaintiff has secured a judgment against or money compromise by the United States. Congress should consider allowing federal officials leaving government service to elect either to be sued individually for such torts, or to have the United States substituted in their place; and, in electing the latter, such officials would agree to submit to appropriate sanctions imposed by the agency for which they were employed when their tortious conduct occurred.

(7) That such legislation should provide for periodic review by the House and Senate Judiciary Committees of the operation of the legislation implementing the new system of federal enterprise liability and independent administrative sanctions.

V. ANALYSIS: CHANGES AT THE STATE AND LOCAL LEVEL

In recent years, the Supreme Court has broadened significantly the potential liability of state and local officials in cases brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Similarly, the Court's recent decisions have expanded the liability of municipalities and other local governmental units for money damages under section 1983 and for the costs of attorney fees pursuant to the Civil Rights Attorneys' Fees Act of 1976, 42 U.S.C. § 1988. It is widely believed that since section 1988 went into effect the availability of attorney fees in itself has contributed greatly to the marked increase of section 1983 cases. These developments have been the subject of congressional scrutiny and intense criticism by state and local officials who claim that the floodgates are open for frivolous and expensive lawsuits against state and local officials and municipalities.

A substantial number of the section 1983 cases arise from actions taken by state and local officials in administering federal assistance programs.[1] Federal assistance will continue to be a major source of section 1983 litigation because, notwithstanding the Reagan Administration's efforts to reduce grant funds, federal grant outlays are estimated to exceed $81.4 billion in FY 1983.[2]

And perhaps the greatest irony of the Reagan Administration's ''New Federalism'' initiatives, which are intended to transfer to state and local governments greater responsibility for managing federal assistance programs, is that this policy could dramatically increase the states' exposure to litigation under section 1983.[3] For this reason alone, it is appropriate to consider whether improvements can be made in the existing civil sanction system to better meet the twin objectives of effective management of federal assistance programs by state and local officials and the vigorous enforcement of individual rights and federal laws relating to such programs.

This chapter first reviews the major Supreme Court decisions involving section 1983 and examines the special problems these decisions present for state and local officials and municipalities involved in the administration and management of federal assistance. The chapter then presents the results of a nationwide survey of state civil sanction systems and legislative developments. Recent congressional proposals to amend sections 1983 and 1988 are also reviewed. Conclusions and recommendations are limited to the problems of section 1983 liability insofar as liability arises out of the acts of state and local officials and municipalities in administering federal assistance.[4]

---

[1] The term federal assistance as used in this chapter encompasses any disbursement or transfer of property—including money—by the federal government that supports programs and projects that benefit the public and that is accompanied by an agreement by the recipient to comply with any terms or conditions relating to the use of the disbursement or property.

[2] *See* OMB, *The Budget of the United States Government, 1983, Special Analysis H: Federal Aid to State and Local Governments.*

[3] Madden & Harkins, *New Block Grant Programs Face Period of Adjustment in the Courts*, V. 4, no. 26, The National Law Journal 29 (March 8, 1982).

A. *Liability Under 42 U.S.C. § 1983*

1. Reprise

The Supreme Court's 1961 decision in *Monroe v. Pape*,[5] established section 1983 as the primary basis for the recovery of money damages against state and local officials. According to *Monroe*, section 1983 actions are available to an injured party even though a remedy exists under state law, since "the federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before that federal one is invoked."[6] However, the Court in *Monroe* retained the concept of absolute immunity from liability for municipalities under section 1983.[7]

Since *Monroe*, section 1983 has been used to establish the personal liability of several types of public officials and employees at all levels of state and local government.[8] For example, officials declared amenable to suit under section 1983 include a state governor,[9] state prison officials,[10] township supervisors,[11] police officers,[12] a commissioner of police,[13] welfare officials,[14] a school superintendant,[15] local school officials,[16] and a state commissioner of education.[17]

---

[4] No attempt is made to discuss and resolve the problem of section 1983 liability in all of its complexities. Rather, the discussion of section 1983 liability is limited solely to the somewhat relatively narrow area of federal assistance and the special problems for state and local officials and municipalities involved with federal assistance programs under that provision.

[5] 365 U.S. 167 (1961). The Court in *Monroe* considered the "under color of" state law language of section 1983 and held that that section provided "a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Id.* at 172.

[6] *Id.* at 183. In addition, plaintiffs are not required to exhaust state administrative remedies prior to bringing a section 1983 action. *See* Patsy v. Board of Regents, 102 S. Ct. 2557 (1982).

[7] 365 U.S. at 187–92.

[8] States continue to enjoy eleventh amendment immunity to damages suits under section 1983, since they are not considered to be persons within the meaning of that section. Quern v. Jordan, 440 U.S. 332 (1979); Edelman v. Jordan, 415 U.S. 651 (1974). However, as a practical matter, a state is subject to liability under section 1983 in cases where injunctive relief against state officials in their official capacity is awarded and consequently the state must implement the terms of the injunction. Ex parte Young, 209 U.S. 123 (1908). *See Edelman, supra*, at 667–68 (federal courts may enjoin state officials to conform their conduct even though such an injunction may have an ancillary effect on the state treasury).

[9] Scheuer v. Rhodes, 416 U.S. 232 (1974).

[10] Procunier v. Navarette, 434 U.S. 555 (1978); *cf.* Jaworski v. Schmidt, 684 F.2d 498 (7th Cir. 1982).

[11] Detz v. Hoover, 539 F. Supp. 532 (E.D. Pa. 1982).

[12] Pierson v. Ray, 386 U.S. 547 (1967); DiGiovanni v. City of Philadelphia, 531 F. Supp. 141 (E.D. Pa. 1982).

[13] *DiGiovanni, supra* note 12.

[14] Goldberg v. Kelly, 397 U.S. 254 (1970).

[15] Ingrahm v. Wright, 525 F.2d 909 (5th Cir. 1976).

[16] Wood v. Strickland, 420 U.S. 308 (1975).

[17] Barrea v. Wheller, 475 F.2d 1338 (8th Cir. 1973), *aff'd*, 417 U.S. 402 (1974).

State and local officials may defend themselves from liability under section 1983 by asserting a qualified-immunity defense.[18]

The impact of section 1983 on the activities of local governments and their officials increased dramatically with two landmark rulings by the Supreme Court: *Monell v. Department of Social Services*[19] and *Owen v. City of Independence*.[20] These two decisions broadened the liability of municipalities for the actions of their officials in suits under section 1983.[21] In *Monell*, the Court held for the first time that municipalities are subject to suit under section 1983, overruling a contrary holding made only eighteen years earlier in *Monroe*.[22] The crowning blow to local governmental immunity came two years later in *Owen*, where the Court held that local governments could not claim the qualified-immunity defense. In *Owen*, the Court ruled that a municipality sued under section 1983 is liable under ordinary standards of negligence and may not claim the good faith of its officers or agents as a defense to such suits.[23] In reaching this result the Court strongly credited public policy considerations of compensation of victims and deterrence of future deprivations.[24]

In the aftermath of *Monell* and *Owen*, municipalities and other local governmental units[25] face a form of strict liability which closely approaches enterprise liability, since in addition to suing a local official under section 1983, a plaintiff may simultaneously sue that official's governmental employer.[26] Local liability, however, is limited to actual damages. According to *City of Newport*

---

[18] *See* Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982), *modifying* Scheuer v. Rhodes, *supra* note 9.

[19] 436 U.S. 658 (1978).

[20] 445 U.S. 622 (1980).

[21] However, a municipality is not vicariously liable for the acts of its agents or employees under the doctrine of *respondeat superior*. 436 U.S. at 691. *See also* Leonhard v. U.S., 633 F.2d 599, 622 (2d Cir. 1980).

[22] In *Monell*, the court determined that a city policy which required pregnant employees to take maternity leave after the fifth month of pregnancy violated rights secured by section 1983. The Court consciously reversed its holding in *Monroe* and declared that local governments could be liable for violations of section 1983. The Court stated "[if government, in the execution of its] policy or custom, whether made by its lawmakers or those whose edicts or acts may fairly be said to represent official policy, inflicts the injury [then] the government [can be held] responsible." 436 U.S. at 684.

[23] The Court considered the scope of municipal liability under section 1983 in the context of a suit by a city police chief challenging his dismissal by the city manager without notice of the reasons for dismissal or an opportunity to be heard. 445 U.S. at 625–30.

[24] *Id.* at 651.

[25] County governments are also subject to suit under section 1983 if under the state constitution the county is not considered to be part of the state for eleventh amendment purposes. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 668 n.12 (1974); Holley v. Lavine, 605 F.2d 638 (2d Cir. 1979), *cert. den.*, 446 U.S. 913 (1980); Knight v. Carlson, 478 F. Supp. 55 (E.D. Cal. 1979).

[26] *See, e.g.*, Garris v. Rowland, 51 U.S.L.W. 2050 (5th Cir. June 24, 1982).

v. Fact Concerts, Inc.,[27] section 1983 liability does not extend to punitive damages.[28]

The potential for a dramatic increase in suits against state and local officials and municipalities involved in managing federal grant programs is perhaps seen most clearly in *Maine v. Thiboutot*.[29] In *Thiboutot*, the Court stated explicitly what had been the implicit premise of a generation of section 1983 litigation; namely, that section 1983 reaches the "deprivation of any rights secured by the constitution and laws"[30] of the United States. The Court held that section 1983 should be read in accordance with its literal language, and thus should be construed to "broadly encompass violations of federal statutory law as well as constitutional law."[31]

The Court in *Thiboutot* also had occasion to consider whether attorney fees could be awarded in section 1983 claims based on purely statutory violations.[32] The Court, relying once again on the "plain language" reasoning which it had applied to section 1983, held that section 1988 authorized the award of attorney's fees in "any § 1983 action."[33]

A trend toward increased litigation arising from federal grants and assistance may be marked by the decision in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*.[34] Justice Powell, writing for the majority, held that private suits under section 1983 may be used to enforce federal statutory rights unless Congress has explicitly or implicitly precluded such suits. Thus, section 1983 is not available "when the remedial devices provided in a particular act are sufficiently comprehensive, [so as] to demonstrate congressional intent to preclude such suits.''[35] Importantly, Justice Powell also declared that private suits may be precluded if the statute at issue fails to establish the kind of ''rights, privileges and immunities'' enforceable under section 1983;[36] an exception first recognized by Justice Rehnquist in *Pennhurst State School and Hospital v. Halderman*.[37]

---

[27] 453 U.S. 247 (1981). The Supreme Court ruled that municipalities are immune from liability for punitive damages under section 1983. According to Justice Blackmun, damages for punitive purposes are not "sensibly assessed" against a governmental entity, since the traditional objectives of punitive damages—retribution, deterrence and punishment—would not be served by imposing such liability on a municipality vis-a-vis its blameless or unknowing taxpayers. *Id.* at 261.

[28] The decision in *Fact Concerts* has been welcomed by local officials. *See, e.g.*, *Municipal Liability Under 42 U.S.C. § 1983: Hearings Before the Subcommittee on the Constitution of the Senate Committee Judiciary*, 97th Cong., 1st Sess. 322 (1981) (statement of Ken Eikenberry) (hereinafter cited as *Section 1983 Hearings*).

[29] 448 U.S. 1 (1980).

[30] 42 U.S.C. § 1983.

[31] 448 U.S. at 4.

[32] *Id.* at 9.

[33] *Id.* While the ruling in *Thiboutot* underscored the scope of sections 1983 and 1988, the Court's decision in the companion case of Maher v. Gagne, 448 U.S. 122 (1980), imposed on section 1983 defendants the added burden of attorney's fees in cases where a plaintiff prevails through a settlement rather than through litigation leading to favorable judgment. Successful defendants may also be reimbursed, but the standards are much more stringent than for plaintiffs. *See* Cass, *Damage Suits Against Public Officers*, 129 U. Pa. L. Rev. 1110, 1155 n. 170 (1981). For a general discussion of the Act, *see* Witt, *The Civil Rights Attorneys' Fees Awards Act of 1976*, 13 Urb. Law. 589 (1981). One lower court has decided, however, that where a statute provides a private cause of action, a plaintiff cannot add a claim under section 1983 for the sole reason of obtaining an attorney fee award. *See* Tatro v. Texas, 516 F. Supp. 968 (N.D. Tex. 1981).

[34] 453 U.S. 1 (1981).

Although *National Sea Clammers* may well have been intended to restrict the availability of section 1983, its consequence may be to open the door to litigation still further. Justice Powell's attempt to articulate two narrow exceptions to section 1983 availability—the ''exclusive remedy'' and ''rights'' exceptions—could have the anomalous effect of making section 1983 the remedy of choice in disputes involving claims under many federal-state cooperative programs.[38]

In addition to *Thiboutot* and *National Sea Clammers*, the greatest impact on the subject of official liability as it relates to federal assistance may evolve from a long-running dispute over fund termination involving federal defendants. The issue in *Velde v. National Black Police Ass'n.*[39] was whether federal officials may claim absolute immunity from personal liability for allegedly failing to enforce statutory conditions of grant funding against state and local government agencies charged with discrimination.

At the end of its 1981 term the Court remanded *Velde* in light of its decision in the controversial case of *Harlow v. Fitzgerald*.[40] As discussed in detail elsewhere, the Court held in that case that the President's chief aides are not entitled to absolute immunity.

The ruling in *Velde* is significant to all types of assistance mechanisms with respect to state and local as well as federal officials. In view of the Court's apparent refusal to grant absolute immunity, it is now more certain than ever that the decisions of government officials under an assistance program, which affect the substantive obligations and rights created by such program, will be challenged by litigation notwithstanding the ability of officials to raise and ultimately establish a qualified immunity.

2. *Problems Related To Federal Assistance*

This section analyzes the implications of the recent case law for federal assistance by focusing on the 1981 block grant programs,[41] because these measures are representative of the current movement giving state and local officials more responsibility for managing federal grant programs. It should be noted that as a matter of law, the courts have not recognized any difference between block grants and other federal grant programs.[42]

---

[35] *Id.* at 20.

[36] *Id.*

[37] 451 U.S. 1 (1981). In *Pennhurst*, the Supreme Court was concerned about the unintended consequences that might result if open-ended and ''indeterminate'' statutory phrases of grant statutes are construed as conferring enforceable rights on individuals. *Id.* at 4. The significance of *Pennhurst* is considered below in relation to the obligation of state and local grantees to comply with the conditions of grant assistance. *See infra* text accompanying note 52.

[38] This point is analyzed below more fully in connection with the discussion of block grant suits under section 1983. *See infra* text accompanying note 63.

[39] 102 S. Ct. 3503 (1982).

[40] 102 S. Ct. 2727 (1982).

[41] A block grant is a federal program designed to achieve some broad national purpose and in which funds are allocated under a formula to a state government for use in a broad functional

a. Rights and Obligations Under Section 1983

Federal grants are presently the central topic of an impassioned debate over the proper role of the federal government in our federal system. To one extent or another, the nine block grants enacted in 1981 are each aimed at alleviating the perceived frustration over the federal government's intrusion into the traditional prerogatives of state and local governments.[43]

However, it is apparent that several factors could give rise to potential legal problems for state and local officials who manage federal grant programs including block grants.[44] For example, at a time when many local governments and community groups are experiencing financial difficulties,[45] fierce compe-

---

area at the state's discretion. *See* Advisory Commission on Intergovernmental Relations, *Back in Vogue: The Politics of Block Grant Legislation*, n. 16, Intergovernmental Perspective, Washington, D.C., U.S. Government Printing Office, Spring 1981. The statutory authorizations for the 1981 block grant programs are contained in the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 97th Cong., 1st Sess., 95 Stat. 357 (Aug. 13, 1981) (hereinafter OBRA) which establishes block grants in the areas of preventive health, maternal and child health services, alcohol, drug abuse and mental health, primary care, social services, community services, low-income energy assistance, community development and education. *See also* Madden, *Lessons From Block Revenue Sharing*, 36 Fed. B.J. 107 (1977).

[42] Ely v. Welde, 451 F.2d 1130 (5th Cir. 1971).

[43] In an effort to further shift responsibility to the state and local levels, the President's 1983 budget package proposes to combine approximately 35 social programs into seven new block grants and expand three of the block grants enacted in 1981 to include five existing categorical programs. *See The Budget of the United States Government, 1983, Special Analysis H, supra* note 2.

[44] As a separate matter, it should be noted that a recent General Accounting Office report entitled *Early Observations On Block Grant Implementation*, (GAO/GGD-82-79, Aug. 24, 1982), suggests that based on 13 states examined by GAO, state assumption of responsibility for the 1981 block grants has proceeded rather smoothly.

[45] The declining fiscal condition of American cities of all sizes and the adverse impact on cities of federal budget reductions under grants has been well-documented. For example, a November, 1981 report by the United States Conference of Mayors (USCM) entitled, *The FY82 Budget and the Cities: A Hundred City Survey*, indicates that cuts in federal spending have fallen disproportionately on grants to state and local government, with cities being forced to absorb major reductions in housing, community development, education, transit, employment and other vital programs. As a result, cities have had to reduce substantially both the level and types of services they provide to urban residents.

In addition, a staff study prepared by the Joint Economic Committee of Congress entitled, *Emergency Interim Survey: Fiscal Condition of 48 Large Cities* (January 1982), supports the findings of the USCM. The study concludes that a majority of the 48 cities surveyed have had to reduce real service expenditure levels for virtually every service offered in order to accommodate reductions in federal assistance. The study emphasizes that cities, unable to maintain current service levels, are in no position to assume additional administrative or fiscal responsibilities since city governments simply do not have the resources to undertake such responsibilities. The survey thus makes the gloomy prediction that "there will be less success in making state and local government responsible for managing and financing many programs now funded by the Federal Government."

tition can be expected between local entities for available funds.[46] In addition, the unprecedented shift in power to the states to distribute funds received under block grants is likely to generate legal challenges to the use and distribution of limited funds.[47]

The procedural requirements and substantive conditions imposed on state and local grantees under block grant programs are also likely to provide a source for legal challenges by third parties and intended beneficiaries[48] of block grant funds. And importantly, state and local grantees will be subject to the so-called crosscutting requirements of the more than 20 statutes that govern the expenditure of all types of grant funds.[49] In this regard, state officials are required to make contractual assurances that they will perform the various statutory conditions which accompany block grant assistance and that they will distribute funds equitably to local entities.[50]

The assurances made by a state in its annual application will establish important rights for the millions of third parties identified by Congress as the

---

46. In its April, 1982 report entitled *Briefing Book on Block Grants and New Federalism*, the Coalition on Block Grants and Human Needs emphasizes that one of the impacts of block grants on states will be "intense political pressure about allocation choices." The Coalition reports that competing groups that once vied for federal appropriations will now devote their attention to allocation decisions by state and local officials, and that this competition will become especially "intense" as additional funding cuts in grant programs are enacted by Congress.

47. Although to data there has been relatively little litigation involving the 1981 block grants, it is widely acknowledged that the opportunity for extensive litigation is likely to increase as states make greater use of their discretion to make funding decisions and as constituencies become frustrated by service cuts or other decisions associated with state and local implementation of block grant programs. *See*, *e.g.*, Coalition on Block Grants and Human Needs, *Briefing Book on Block Grants and New Federalism*, at 71 (April 1982); Remarks of Milton J. Socolar, General Counsel of the General Accounting Office, before The Brookings Institute Seminar on New Federalism, Washington, D.C., June 21–22, 1982.

48. Grant programs typically create benefits not only for the direct recipient of the grant, usually a state or local government or agency, but also for persons or groups—generally referred to as third parties or intended beneficiaries—who often are given certain enumerated rights under the statute authorizing the grant program.

49. There are over sixty government-wide national policies and administrative requirements. These policies include, among others, non-discrimination, environmental protection and energy conservation, and are reflected in these statutes, including: Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*; the Clean Air Act of 1972, 42 U.S.C. § 1857; Title IX of the Education Act Amendments of 1972, 20 U.S.C. § 1681 *et seq.*; and the Federal Water Pollution Control Act of 1948, 33 U.S.C. § 1251 *et seq*. GAO's report, *Early Observations On Block Grant Implementation*, emphasizes that states have been given little guidance on and have limited experience with federal crosscutting requirements. GAO thus suggests that the Office of Management and Budget, in coordination with federal agencies, develop a program for assessing state compliance with federal crosscutting mandates. GAO/GGD-82-79, p.p. 42–44.

50. The 1981 block grants require each state to submit an application for assistance in which the state makes assurances that it will comply with the conditions of federal block grant assistance. For example, the statute authorizing the Community Services Block Grant program, which is worth $348.0 million in FY 1982, requires that at least 90 percent of the funds be distributed to political subdivisions, nonprofit community organizations or migrant and seasonal farm worker organizations. Five percent is allowed for program transfer and five percent is allowed for administrative expenses.

intended beneficiaries of block grant assistance, and will also create obligations for the direct recipient of such assistance, including the state, units of local government and private agencies.[51]

The Supreme Court's opinion in *Pennhurst State School and Hospital v. Halderman*[52] provides important guidance on when federal grant statutes—including those establishing block grants—are likely to be construed as creating "rights" or imposing "obligations" enforceable under section 1983.

Pennhurst involved the interpretation of the Developmentally Disabled Assistance and Bill of Rights Act.[53] The plaintiffs asserted that the Bill of Rights section of the Act—set forth in the form of legislative findings—required Pennsylvania to establish individual treatment programs for each resident of Pennhurst State School and Hospital. The Supreme Court disagreed and concluded that the Act did not create rights nor impose obligations on a state that received federal grant assistance under the Act.

The significance of *Pennhurst* to the new block grant programs can be seen from the rationale of Justice Rehnquist's majority opinion. Initially, Justice Rehnquist acknowledged the authority of Congress to establish grant programs and set conditions for the expenditure of funds under the spending power of the Constitution.[54] But he reasoned that the implications of this authority are that:

> [L]egislation enacted pursuant to the spending power is much in the nature of contract: In return for federal funds, the states agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the state voluntarily and knowingly accepts the terms of the 'contract.'[55]

Justice Rehnquist continued:

> There can, of course, be no knowing acceptance if a state is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal monies, it must do so unambiguously.[56]

Justice Rehnquist concluded that this statement was a "canon" of statutory construction for all federal grant programs.

---

[51] Federal courts have found third-party beneficiary contracts to exist in situations where a grantee promises or agrees to provide the benefits of grant assistance to another party. *See, e.g.*, Lau v. Nichols, 414 U.S. 563, 568–69 (1974); Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967).

[52] 451 U.S. 1 (1981).

[53] *See* 42 U.S.C. §§ 6010(1) and (2) which provide that persons with developmental disabilities have a "right for appropriate treatment, services and rehabilitation for such disabilities . . . in a setting that is least restrictive of the person's liberty."

[54] The spending power is derived from Art. I, § 8, cl. 1 of the Constitution, which states that "Congress shall have the power to . . . provide for the . . . general welfare of the United States."

[55] 451 U.S. at 17.

[56] *Id.* at 17–18.

The "knowing acceptance" principle of *Pennhurst* was recently cited by the U.S. Court of Appeals for the Third Circuit to support its decision not to give retroactive effect to section 185 of the Education Amendments of 1978[57] which authorizes the Department of Education to order repayment of federal funds misapplied or misspent by grant recipients. In *State of New Jersey Department of Education v. Hufstedler*,[58] the Department had contended that it could compel the repayment of grant funds under section 185, even though such funds had been awarded in 1976, five years prior to the enactment of section 185. The Third Circuit acknowledged that *Pennhurst* was not directly applicable, but nevertheless concluded that:

> [T]he overarching principle of *Pennhurst*—that the terms and conditions of a federal grant must be set forth clearly and unambiguously in the statute enforcing the grant—precludes us from giving retroactive effect to a statute passed five years after the last disputed funds were received.[59]

At a time when there is vigorous opposition by the administration and grant recipients to excessive federal regulation of grant programs, *Pennhurst* provides a viable basis for challenging the broad range of conditions that now govern federal grant programs. However, *Pennhurst* also establishes a very important corollary: where a federal grant statute imposes unambiguous conditions—as many federal grant statutes do—state and local grantees will be legally obligated to perform such conditions.[60]

b. *Remedies Under Section 1983*

National Sea Clammers has emerged as the pivotal decision for determining whether the ultimate beneficiaries of federal assistance will have remedies under section 1983. Under this case, third party beneficiaries can bring a section 1983 action if they are denied benefits under a block grant, unless (1) Congress has provided an exclusive remedy, or (2) if the rights the beneficiary seeks to protect are not the kind of rights protectable under section 1983.

---

[57] 20 U.S.C. § 2835.

[58] 662 F.2d 208 (3d Cir. 1981).

[59] *Id.* at p. 214. In contrast, just two days after the Third Circuit's decision in *Hufstedler*, the Fourth Circuit held that section 185 authorized the department to order West Virginia to repay federal funds determined to have been misspent by the state, even though the funds in question were received by the state in 1975. Notably, unlike the Third Circuit, the Fourth Circuit made no reference to the "overarching principle of *Pennhurst*." State of West Virginia v. Department of Education, 667 F.2d 417 (4th Cir. 1981).

[60] The *Pennhurst* decision continues to generate legal controversy despite the Court's 1981 decision. Pennsylvania recently filed a petition for certiorari with the Supreme Court seeking review of the Third Circuit's refusal to order a refund of more than $1.2 million paid in fines by Pennsylvania. Pennhurst State School and Hospital v. Halderman, 673 F.2d 628 (3d Cir. 1982) (*en banc*), *petition for cert. filed*, 51 U.S.L.W. 3027 (U.S. June 18, 1982) (No. 81-2363). The fines were paid pursuant to a contempt citation issued against Pennsylvania for its failure to comply with a federal district court's order requiring Pennsylvania to fund Special Masters who were supervising the transfer of residents at Pennhurst State School and Hospital. *See* Halderman v. Pennhurst State School and Hospital, 533 F. Supp. 631 (E.D. Pa. 1981). Pennsylvania's failure to comply with the district court's order was based on the state legislature's refusal to grant a supplemental appropriation for $900,000 for special masters' salaries and expenses. The issue the Supreme Court is being asked to consider—whether the state's inability to comply with the district court's order because of the legislature's refusal to appropriate the necessary funds is a defense to the fines imposed on the state for civil contempt—raises a more fundamental question concerning the scope of the remedial powers of federal courts in actions brought against state officials under state law.

A strong argument can be made that private suits under section 1983 may be brought to remedy violations of the statutory provisions of the 1981 block grant programs. A brief analysis of the Supreme Court's reasoning in *National Sea Clammers* supports this view.

In *National Sea Clammers*, the Court indicated that legislative intent is the relevant inquiry under the exclusive remedy exception to section 1983 suits.[61] In that case, the Court concluded that the ''elaborate enforcement provisions'' under the Federal Water Pollution Control Act (FWPCA) and the Marine Protection, Research and Sanctuaries Act (MPRSA) were evidence of congressional intent to ''supplant any remedy that otherwise would be available under section 1983.''[62]

In the new block grants, as with most other grant programs, Congress has only provided limited administrative procedures for withholding funds from a state grantee that fails to meet the statutory requirements of a block grant.[63] It is very unlikely that these remedies would be considered to constitute the ''unusually elaborate enforcement'' mechanisms found to exist in *National Sea Clammers*.[64] Furthermore, since the block grant statutes do not expressly authorize private suits, as was the case with the statutes at issue in *National Sea Clammers*, the withholding remedies alone would not appear to be the type of remedial devices ''sufficiently comprehensive'' to demonstrate congressional intent to preclude private suits under section 1983.

---

[61] 453 U.S. at 21.

[62] *Id.* Even before the Supreme Court's express disavowal of the availability of section 1983 in situations where Congress has established an ''exclusive remedy,'' lower courts relied upon the existence of such remedies to preclude section 1983 suits. *See, e.g.*, Uniformed Firefighters Ass'n v. City of New York, 512 F. Supp. 289 (S.D.N.Y. 1981); Meyerson v. Arizona, 501 F. Supp. 859, 864 (D. Ariz. 1981). *But see* Smith v. City of Chicago, No. 79 C-3499 (N.D. Ill. March 20, 1981).

[63] Congress has established a procedure whereby the Secretary of the Department of Health and Human Services is authorized to withhold grant funds from a state that fails to use such funds in accordance with the terms and conditions of the Community Services, Preventive Health, Primary Care, Maternal and Child Health, Low-Income Energy Assistance, and Alcohol, Drug Abuse and Mental Health Block Grants. *See, e.g.*, OBRA *supra* note 41, §§ 679, 1907, 1917, and 1929. In addition, the Secretary of Housing and Urban Development is authorized to withhold funds used in violation of the terms and conditions of the Community Development Block Grant program. *Id.* § 302(c)(1).

[64] At least one expert on the subject of federal grant litigation has commented that the ''exclusive remedy'' exception may be inappropriate to apply to federal grant statutes in which typically the only remedies available are administrative sanctions such as suspension or termination of federal grant funds. In such cases, the individuals most directly affected—third party grant recipients—are afforded little participation in the administrative proceeding. Thus, it is unlikely that a court would find them ''exclusive.'' *See* Brown, *Pennhurst As A Source of Defenses for State and Local Governments*, 31 Cath. U.L. Rev. 449 (1982).

The second exception of *National Sea Clammers* raises the more difficult question of whether the 1981 block grants establish the kinds of "rights" enforceable under section 1983. Neither Congress nor the Supreme Court has provided guidance on the nature of rights that may be protected under section 1983.[65]

Since section 1983 is a purely remedial statute and provides no substantive rights,[66] a plaintiff in a block grant suit will have to show that the statute in question confers a right protectable under section 1983. Most grant statutes, including the block grant statutes, expressly identify the intended beneficiaries of federal assistance.[67] Third parties would thus appear to have a strong argument that they do, in fact, have legal rights to the benefits of block grant assistance, and that such rights are enforceable under section 1983.

Two recent district court opinions are particularly instructive on the range of potential judicial dispositions of section 1983 suits. These are *Balf Co., Inc. v. Gaitor*,[68] which demonstrates the degree to which a federal grant statute can be interpreted as creating legal rights, and *Ryans v. New Jersey Comm'n For The Blind*,[69] which involved the question of whether the availability of administrative remedies under a grant program precluded a section 1983 suit based on the "exclusive remedy" test of *National Sea Clammers*.

In *Gaitor*, a case involving the Federal-Aid Highway Act (FAHA),[70] the Balf Company sued the City of Hartford under section 1983, claiming that the city was required to satisfy federal regulations[71] before implementing its decision to restrict vehicular traffic on a local access road financed primarily through FAHA funds and used extensively by Balf Company to transport its concrete mix and other stone products. The city defended on the grounds that Balf Company lacked standing, arguing that based on *Cort v. Ash*,[72] FAHA provided no

---

[65] The Court in *National Sea Clammers* did not reach the question of whether there existed rights protectable under section 1983, because it found that Congress had "foreclosed a § 1983 remedy" by providing an exclusive remedy. 453 U.S. at 21.

[66] Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 617–18 (1979).

[67] *See, e.g.*, the Alcohol, Drug Abuse and Mental Health Block Grant statute, which provides that in its annual application for assistance, a "state agrees to make grants to community mental health centers in the state for the provision of comprehensive mental health services—(A) principally to individuals . . . who are chronically ill . . ." and also "agrees to require that any community mental health center . . . provide—(A) outpatient services, including specialized services for children, the elderly, [and] individuals who are chronically mentally ill. . . ." OBRA *supra* note 41, §§ 1915(c)(3) and (4). *See also* Title I of the Rehabilitation Act of 1973, 29 U.S.C. § 723, which specifies a number of benefits and services which must be provided to eligible handicapped individuals.

[68] 534 F. Supp. 600 (D. Conn. 1982).

[69] 542 F. Supp. 841 (D. N.J. 1982).

[70] 23 U.S.C. § 101 *et seq*.

[71] 23 C.F.R. § 620.203(a).

[72] 422 U.S. 66 (1975). In Cort v. Ash, the Supreme Court adopted a four factor test for analyzing whether a private cause of action can be implied under a particular statute. The first and most important of the *Ash* factors is whether the plaintiff is one of the class for whose especial benefit the statute was enacted.

"right" upon which to base a section 1983 claim, since FAHA was not adopted for the "especial benefit" of the Balf Company.

The district court characterized the issue in *Gaitor* as whether a "plaintiff in a section 1983 action must establish independent statutory rights and a corresponding implied right to sue under that statute before such party can bring a section 1983 action, or alternatively, whether some lesser standard to confer standing is mandated after *Maine v. Thiboutot*."[73] The court found that the *Cort v. Ash* analysis was inapplicable in a section 1983 action, reasoning:

> [I]f the plaintiff was unable to prove that the FAHA was adopted for its especial benefit, then presumably that plaintiff would be barred from suing the state defendants, even if the acts of those defendants violated federal law and seriously injured the plaintiff. *Thiboutot* and § 1983 thus would be rendered *sui generis* in these type of cases, a result that the *Thiboutot* Court by its language clearly did not contemplate.[74]

In light of this analysis, the court announced a separate test for recognizing rights enforceable under section 1983. The court held that a plaintiff in a section 1983 action "need not establish that it has an implied right to sue under a separate federal statute, but rather must demonstrate that it has suffered an injury by the administration of a joint federal-state cooperative program and was an *intended beneficiary* of that program."[75] (Emphasis in original.)

The court went on to find that FAHA, though not adopted for the "especial benefit" of the Balf Company, "clearly was intended . . . to benefit those persons who travel extensively in interstate commerce."[76] Thus, the court ruled that Balf Company had standing to bring suit under section 1983, because it "may have been deprived of a 'right' secured by the laws of the United States, namely, the right to require [compliance] with FAHA regulations."[77]

Gaitor is significant because it demonstrates the liberal degree to which a grant statute can be construed as creating a federally protectable right under section 1983. The decision in *Ryans* further extends the potential applicability of section 1983 to rights arising out of the administration of federal assistance programs by state and local officials because of its narrow reading of the "exclusive remedy" exception enunciated in *National Sea Clammers*. In *Ryans* a central issue was whether the administrative remedies of the Rehabilitation Act of 1973, 29 U.S.C. § 722(d), were exclusive and thus precluded a section 1983 action to enforce rights created by Title I of the same Act.[78]

---

[73] 534 F. Supp. at 604.

[74] *Id.*

[75] *Id.* at 605. In its analysis, the court relied heavily on Yapalater v. Bates, 494 F. Supp. 1349 (S.D.N.Y. 1980), where the court concluded that *Thiboutot* "necessarily limits the applicability of the Cort v. Ash analysis." *Bates* at 1357. The effect of *Thiboutot* being to "create a remedy where injury flows from a state's violation of governing federal law in a joint federal-state cooperative program." *Bates* at 1358.

[76] *Id.*

[77] *Id.*

[78] 542 F. Supp. at 844.

The court turned to the Rehabilitation Act's legislative history in order to determine whether "a § 1983 remedy would be inconsistent with the statutory scheme" of 29 U.S.C. § 722(d) and whether the statute "suggests an intent on the part of Congress to foreclose" an action under section 1983. The court held that unlike the circumstances in *National Sea Clammers*—where the underlying statutes contained their own highly comprehensive set of enforcement remedies—"the procedures set forth in 29 U.S.C. § 722(d) and a civil action under § 1983 would not be inconsistent but complementary."[79] In reaching this conclusion, the district court emphasized that it was "heeding" the "mandate" of *Rosado v. Wyman*,[80] where the Supreme Court held that courts should be:

> [M]ost reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program.[81]

Gaitor and *Ryans* are but two recent examples of a long line of cases in which third parties have sued state and local officials and agencies for denial of rights and benefits secured under a federal grant statute,[82] as well as for failure to comply with the terms, conditions, and assurances relating to grant assistance.[83]

Gaitor's and *Ryans'* interpretation of *National Sea Clammers* have heightened significance when one considers that most, if not all, federal grants establish literally scores of directives and conditions which state and local grant administrators must interpret and enforce. If these officials misinterpret or inadvertently disregard such directives and conditions, they are likely to subject themselves, or in the case of local officials their government employer, to suit under section 1983 by an aggrieved third party.[84] The potential for such a result is perhaps most apparent in the case of the 1981 block grants.

---

[79] *Id.* at 848. 29 U.S.C. § 722(d) requires the director of a state vocational rehabilitation agency to establish procedures for the review, upon the request of a handicapped individual, of determinations made by the state rehabilitation counselor respecting that individual's eligibility to receive benefits under Title I of the Rehabilitation Act. In addition, any handicapped person who is dissatisfied with the decision of the state agency director may request the Secretary of Health and Human Services (HHS) to review the state director's decision. In such cases, the Secretary is authorized to make recommendations to the state director as to the appropriate disposition of the matter.

[80] 397 U.S. 397 (1970).

[81] *Id.* at 420.

[82] *See generally* Madden, *Constitutional and Legal Foundations of Federal Grant Programs*, Federal Grant Law, ABA (1981). *See also* Goldberg v. Kelly, 397 U.S. 254 (1970); South Eastern Human Development Corp. v. Schweiker, No. 82-1241 (8th Cir. Aug. 27, 1982); Montgomery Improvement Association v. HUD, 645 F.2d 291 (5th Cir. 1981); Lynch v. Maher, 507 F. Supp. 1268 (D. Conn. 1981); Coalition for Block Grant Compliance v. Dept. of Housing and Urban Development, 450 F. Supp. 43 (E.D. Mich. 1978).

[83] *See, e.g.*, Hendrick Hudson Central School District v. Rowley, 50 U.S.L.W. 4925, (U.S. June 28, 1982), Lau v. Nichols, and Bossier Parish School Bd. v. Lemon, *supra* note 51; City of Englewood v. City of Los Angeles, 451 F.2d 948 (9th Cir. 1972). Apart from actions against state and local officials, it is well established that third parties may sue federal grantor agencies to assure that such agencies enforce the requirements of grant programs providing third party benefits or rights. *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973). *But see* Weems v. Pierce, 534 F. Supp. 740 (C.D. Ill. 1982). Finally, apart from suits brought by third parties, the federal government has ample authority to sue state and local grantees to enforce compliance with the conditions of grant assistance. *See* United States v. Marion County School District, 625 F.2d 607, *reh. den.*, 629 F.2d 1350 (5th Cir. 1980).

The Reagan Administration, in implementing its policy of giving state and local officials greater discretion to spend federal grant funds, has kept federal regulation of the 1981 block grants at a minimal level.[85] However, without the guidance of federal regulations state and local officials will face difficult choices in interpreting and complying with the myriad of federal statutory directives and conditions accompanying block grant assistance.

A recent decision by the U.S. Court of Appeals for the Eighth Circuit is an example of the confusion that can result over the interpretation of the obligations a federal grant statute may impose on a state that receives federal assistance. In *South Eastern Human Development Corporation v. Schweiker*,[86] the plaintiff, a nonprofit community services organization, sued South Dakota[87] for its failure to comply with the reporting and public hearing requirements of section 1742 of OBRA. Title VI of OBRA established the Community Services Block Grant Program (CSBG). For fiscal year 1982 only, a state had the choice either to administer the CSBG program or to have its allotment distributed by HHS.[88] The Governor of South Dakota notified HHS of the state's intention to administer the CSBG program during FY 1982. However, no public hearings were held regarding FY 1982 Community Service funds and the state did not submit its report on the planned use of FY 1982 funds until December 11, 1981, more than two months after the commencement of FY 1982.[89]

---

[84] One congressional witness has testified that the decision in Maine v. Thiboutot gives rise too "double jeopardy" in the area of grants administration, since on the one hand, acceptance of a federal grant requires compliance with "many complex statutes and regulations," while on the other hand, "mandates from the judiciary" create the prospect of having to pay "millions of dollars to implement systematic relief." *See Section 1983 Hearings*, *supra* note 28, at 372 (statement of the Honorable J. Joseph Curran, representing the National Conference of State Legislatures).

[85] For example, the final regulations published by the Department of Health and Human Services covering seven of the nine new block grants emphasize flexibility and primary reliance on state discretion. *See* 47 Fed. Reg. 29472 (July 6, 1982).

[86] No. 82-1241 (8th Cir. Aug. 27, 1982).

[87] The suit named several defendants, including the Secretary of the U.S. Department of Health and Human Services, the Governor of South Dakota, and that state's planning bureau and its director. If the plaintiff had not named a federal defendant official, the case might well have been brought under section 1983.

[88] OBRA, *supra* note 41, § 682(b)(3).

[89] The dispute arose out of a series of decisions made by the Governor of South Dakota which culminated in the termination of grant funds for SEHDC. SEHDC claimed that because the reporting and public hearing requirements were not complied with, the Secretary of the Department of Health and Human Services (HHS) was obligated to distribute, in lieu of the state, the state's FY 1982 block grant allotment. Such action would have resulted in SEHDC's receiving two fiscal quarters' worth of community services funds.

Rejecting the district court's conclusion that state grantees need not comply with section 1742,[90] the Eighth Circuit ruled that the most logical reading of section 1742 and its legislative history indicated that in adopting section 1742, Congress clearly intended to provide minimal protection for a state's citizens in the form of reporting and public participation mechanisms. Thus, the court ordered the Secretary of HHS to distribute to SEHDC the funds they would have received for the first two quarters of FY 1982.

The problem of increased grant litigation—in which plaintiffs generally seek injunctive or other equitable relief[91]—is only the tip of the section 1983 iceberg: liability for money damages is now a foreseeable consequence for the mismanagement or misinterpretation of a federal grant program, since section 1983 explicitly provides that "every person . . . shall be liable to the party injured." Moreover, several commentators have suggested that lower courts following *Thiboutot* and *Owen* may feel compelled to award damages to a prevailing party in a section 1983 grant suit.[92]

In such suits, government officials will be insulated from liability for money damages to the extent that the circumstances surrounding the challenged action fall within *Scheuer's* analysis of the good-faith immunity defense. However, local governments would, as a result of *Monell*, *Owen* and *Thiboutot*, be liable for actual damages a third party may incur as a result of the mismanagement or improper administration of a program relating to a federal grant.[93]

Fortunately, for state and local officials, the threat of personal liability under section 1983 is offset in varying degrees by the existence at the state level of systems[94] which provide (1) free defense counsel; (2) indemnification; (3) insurance; and (4) risk management training.[95] For municipalities, however, the threat of section 1983 liability remains acute.[96]

---

[90] Civ. 81-3072, (D.S.D. 1982).

[91] *See, e.g.*, Lau v. Nichols, *supra* note 51; Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977); Barrera v. Wheller, 475 F.2d 1338 (8th Cir. 1973), *aff'd*, 417 U.S. 402 (1974); Fox v. Dept. of Housing and Urban Development, 468 F. Supp. 987 (E.D. Pa. 1980).

[92] *See, e.g., Section 1983 Hearings, supra* note 28, at 95 (statement of Roy D. Bates on behalf of the National Institute of Municipal Law Officers); *Id.* at 336 (statement of Prof. George D. Brown). Professor Brown makes an interesting observation with respect to the types of situations in which damages might be awarded in grant suits. Professor Brown reasons that since the denial of a government benefit essential to a person's health or life itself could result in serious and demonstrable harm, such action could arguably be viewed as a common-law tort and thus properly subject to damages. It should be noted, however, that a successful argument along these lines requires first that there be a deprivation of some "right," as required by section 1983 itself. Whether a benefit conferred on an individual by a particular grant statute will rise to the level of a right protected by section 1983 will be a crucial, if not determinative, issue in all section 1983 grant disputes. This issue was analyzed *supra* in the text accompanying note 66.

[93] Although comprehensive empirical data on the fiscal impact on municipalities of increased liability under sections 1983 and 1988 is not available, a 1981 survey by the National Institute of Municipal Law Officers (NIMLO) documents the potential liability of local governments for damages pursuant to section 1983. The NIMLO survey of more than 200 municipalities indicates that there is approximately $4.8 billion in pending civil rights claims against local governments. *See Section 1983 Hearings, supra* note 28, at 120 (statement of Roy D. Bates on behalf of NIMLO). While this figure is staggering, the actual dollar amount of recoveries against municipalities sued under section 1983 is not known.

c. *Increased Litigation*

While the existence at the state level of systems designed to protect officials from personal liability may effectively serve in many instances to insulate the individual from financial disaster, other identifiable problems will persist.

For one thing, the prospect of increased litigation is likely to dampen state or local government enthusiasm for taking innovative and adaptive approaches toward program management, as it would seem more likely than not that as officials exercise greater discretion, they increase the probability that their administration of a federally assisted program will be challenged. Program managers, when confronted with the prospect of increased liability, may introduce protective measures to insulate themselves from that risk. These measures, in the form of more elaborate procedures, extensive review and coordination mechanisms, or manifold levels of decision and approval—all of which seem managerially proper—could add to existing levels of administrative inertia, delay and wasted resources. Consequently, government may become less effective as decision makers become more preoccupied with the possible consequences of a decision, rather than being concerned about the effect their decisions will have on the intended recipients of governmental assistance.

A second effect of increased litigation under federal assistance programs relates to the degree to which delegation occurs in most government bureaucracies. The government official made a party to most section 1983 actions is often the highest elected or appointed official having responsibility over the function or person whose actions precipitated the alleged injury. In very large bureaucracies, such as those servicing social assistance programs, the actions of subordinate officials may be beyond the direct cognizance of the person in charge. As a result, higher ranking government officials will bear a disproportionate burden of liability solely because of their rank rather than because of any misconduct on their part.

The third possible effect of increased litigation is a deterioration of state relations with the federal government. Presently, the federal government and its officials retain much more immunity than state or local officials and municipalities. This disparity in burden-sharing and liability between the federal "actors" on one hand and state and local governments and officials on the other, can be a source of friction, and may result in an understandable reluctance by some state and local governments to assume responsibilities for federal assistance programs when the greatest legal exposure is directed toward them.

---

[94] *See infra* text accompanying note 105.

[95] Risk management as used here, refers to a process in which sources of official liability are identified and analyzed in an effort to devise ways to avoid or reduce such liability. Risk management techniques can range from formal training programs and workshops to periodic seminars and informal question and answer sessions. Regardless of what form of risk management is practiced, its overriding benefit can be the reduction and elimination of the sources of official liability, resulting in a reduction in the costs of official misconduct to a state or local governmental employer. An overview discussion of risk management and its increasing popularity among municipalities is provided by Jaron, *The Threat of Personal Liability Under the Federal Civil Rights Act: Does It Interfere with the Performance of State and Local Governments?*, 13 Urb. Law. 1 (1981).

[96] For a review of the problems faced by municipalities, local officials and employees as a result of the failure (or unwillingness) of the insurance industry to provide adequate liability insurance coverage, *see* Jaron, *supra* note 95.

A fourth consequence of increased litigation could be to heighten the already developing weariness of government officials who discover more and more of their time and energy being sapped in responding to legal claims and defending their actions under federal assistance programs, rather than in directing and overseeing tasks and subordinates. Consequently, state and local officials may choose not to administer federal assistance programs beyond what they are compelled to do.[97]

Finally, it is widely acknowledged that the often mentioned fear of increased liability is no less chilling for public officials at the state and local levels than for those at the federal level. It could thereby discourage vigorous decision-making at lower levels of government.[98]

Giving state and local grantees and officials greater flexibility to manage federal programs is a broad policy decision supportable on many grounds.[99] However, whatever policy changes are sought and implemented at the national level,[100] it is clear that careful consideration should be given to the fact that federal assistance programs frequently establish a myriad of rights, conditions and obligations which—according to current law—will be enforceable under section 1983.

---

[97] Justice Powell, in his dissent in *Thiboutot*, perhaps best summarizes the negative impact that case could have on the future operation of federal grant and assistance programs:

> In practical effect of today's decision means that state and local governments, officers and employees now may face liability whenever a person believes he has been injured by the administration of any federal-state program, whether or not that program is related to equal or civil rights.

448 U.S. at 22. The pernicious effect of *Thiboutot* has also been the topic of several scholarly articles. *See, e.g.*, Peters, *Municipal Liability After Owen v. City of Independence and Maine v. Thiboutot*. 13 Urb. Law. 407 (1981); Groszyk & Madden, *Managing Without Immunity: The Challenge For State and Local Government Officials In the 1980s*, Pub. Ad. Rev. (March/April 1981).

[98] *See Section 1983 Hearings, supra* note 28, at 397 (statement of Scott Fosler and George Cross, representing the National Association of Counties).

[99] Executive Order 12372, issued July 14, 1982, is the most recent example of the current administration's policy of giving state and local governments more responsibility for administering federal financial assistance and development programs. E.O. 12372 revokes OMB Circular A-95, relating to Evaluation, Review and Coordination of Federal and Federally Assisted Programs and Projects. The new order, to become effective April 30, 1983, strengthens the authority of state and local officials to establish federal assistance review procedures and priorities.

[100] Several proposals which relate to the federal grant system are awaiting congressional action. S. 807, the Federal Assistance Improvement Act of 1981, contains several provisions aimed at improving the federal grant system by simplifying federal assistance requirements to provide greater flexibility to state and local recipients. Although S. 807 has been before Congress in one form or another in recent years, and was recently reported by the Senate Committee on Government Affairs, it is unlikely that the bill will ever be acted upon so long as the President's New Federalism proposal remains a viable alternative. Another old idea has surfaced in the form of S. 10, which

A relatively unexplored avenue for ameliorating the problem of increased litigation under section 1983 is discussed in the 1982 case of *Patsy v. Board of Regents of State of Florida.*[101] In *Patsy*, the Supreme Court held that a judicially-imposed requirement of exhaustion of state administrative remedies as a prerequisite to an action under section 1983 was improper.[102] Importantly, however, in his opinion for the Court, Justice Marshall expressly acknowledged Congress' authority to require exhaustion of state administrative remedies as a prerequisite to bringing *any* action under section 1983,[103] a view that was shared by three other Justices in their concurring opinions.[104]

The Court's approval of such authority takes on added importance when considering viable solutions for avoiding increased section 1983 litigation involving federal assistance programs.

For example, congressional enactment of an exhaustion requirement for claims arising out of state or local management of federal assistance programs would appear to offer a promising system for meeting the twin objectives of effective management of federal assistance programs and the vigorous enforcement of individual rights relating to such programs.

---

passed the Senate last year and would establish a Commission for More Effective Government, patterned after the old Hoover Commissions. However, it is unlikely that the House Government Operations Committee will act on S. 10's companion bill—H.R. 18—this session. In the event that the discussions on New Federalism reach a deadlock, or if Congress is unable to accept the legislation on the proposal, S. 807 and S. 10 may again become central topics of congressional debate.

[101] *See* note 6, *supra*.

[102] Such a requirement had been adopted below by the Fifth Circuit as well as other Courts of Appeals. *See, e.g.*, Patsy v. Florida International Univ., 634 F.2d 900 (5th Cir. 1981) (*en banc*); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969); Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978).

[103] Justice Marshall relied in part on the legislative history of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997(e), to hold that federal courts are generally precluded from requiring exhaustion of state administrative remedies under section 1983. Congress in enacting section 1997(e), according to *Patsy*, carved out a narrow exception to the general no-exhaustion rule to govern certain prisoner claims, and established a detailed scheme to ensure that state administrative remedies are adequate and effective. Justice Marshall concluded that a "judicially developed exhaustion rule in other [section 1983] cases" would be inconsistent with Congress' decision to adopt section 1997(e). 102 S. Ct. 2565. Justice Marshall observed that "Congress' superior institutional competence [suggests] that legislative not judicial solutions are preferable." *Id.* at 2567. He also emphasized that "it is not for us to say whether Congress . . . should create a similar scheme for other categories of § 1983 claims or whether Congress . . . should adopt an altogether different exhaustion requirement for nonprisoner § 1983 claims." *Id.* at 2567–68.

[104] Justice O'Connor, joined by Justice Rehnquist in her concurring opinion, noted that "perhaps Congress' enactment of [42 U.S.C. § 1997(e)], which creates a limited exhaustion requirement for prisoners bringing § 1983 suits, will prompt it to reconsider the possibility of requiring exhaustion in the remainder of § 1983 cases." 102 S. Ct. at 2568. Similarly, Justice White, concurring in part, stated that "exhaustion is a statutory issue and the dispositive word on the matter belongs to Congress." *Id.* at 2569.

Since section 1983 actions would not be precluded but merely postponed until administrative remedies have been exhausted, plaintiffs would retain the important right to have their claims heard by a federal court. Importantly, constitutional claims could be an exception to an exhaustion requirement, thus assuring no delay in the vindication of constitutional rights.

State governments—in keeping with the trend giving them primary responsibility for managing federal programs—would have a first-hand opportunity to correct whatever problems may be found to exist since the state's incentive to establish adequate administrative procedures will be strongest in situations where the state's potential for being sued under section 1983 is the greatest. Moreover, giving the states primary responsibility for handling complaints arising out of grant programs would substantially reduce the need to resort to federal courts for the resolution of disputes which often take years to resolve due to the inherent limitations of the adversary process.

In addition, the existence of state administrative procedures is likely to heighten each state's awareness of the special needs of its citizenry at a time when states are being given more and more responsibility for administering federal assistance programs. The effective use of such procedures is likely over time to reduce the need for federal intervention, and at the same time allow the state to develop procedures which are best suited for handling complaints that arise within the state.

Finally, federal courts could be authorized to waive the exhaustion requirement in prescribed cases in order to ensure that state procedures made available are used to resolve those claims which are best suited for resolution in an administrative forum.

B. *State Responses to Section 1983 Liability*

The extensive experience at the state level in coping with section 1983 liability provides an obviously worthwhile source of information for evaluating innovations that may have general applicability. Accordingly, a survey was conducted in which the fifty state attorneys general were asked to provide information on existing systems directed toward ameliorating the problem of official liability.[105] Specifically, each state attorney general was contacted to determine:

(1) Whether enterprise liability had been substituted for the personal liability of officials or employees in any respect?

(2) Whether there exists a mechanism for either defending, indemnifying or insuring officials and employees in damage actions?

(3) Whether there exists a risk management program designed to identify and reduce potential areas of liability exposure?

(4) Whether any disciplinary procedures or administrative plans have been implemented to correct and reduce instances of official or employee misconduct that have or could result in liability?

---

[105] *See* Appendix B, which contains a copy of the survey letter sent to each attorney general. In many instances, telephone contacts provided useful supplements to the survey.

(5) Whether, based on the state's activities and experience in the area of official immunity and liability there are any suggestions or recommendations to be made with respect to the problem of liability of state or local officials for money damages?

While the mechanisms in effect in any state are to some extent unique, the survey responses indicate several common ways in which the states seek to protect government officials from liability under section 1983. By way of summary, many states now provide for the defense and indemnification of state officials and employees who acted in good faith.[106] Without exception, however, the availability of these protections is contingent upon that official's having acted within the "course and scope of employment" and that his or her conduct was not "willful and wanton," "malicious," "malfeasant," or "grossly negligent." In effect, these state statutes follow closely the qualified immunity standard of *Scheuer v. Rhodes*.[107] In some states, the protective measures noted here extend to officials and employees of that state's political subdivisions.[108] In addition, many states authorize or require programs of insurance for state officials, employees of state agencies, and persons employed by political subdivisions.[109]

No state appears to have embarked on a comprehensive shift toward reliance on enterprise liability to the extent reflected at the federal level in the proposed amendments to the FTCA. The survey reveals that state experience with risk management training programs, disciplinary proceedings, and similar approaches varies widely.[110]

A description of the different state approaches to section 1983 liability and a summary discussion of the relevant statutory provisions in effect in each state is presented below.[111] In cases where no survey response was received from a state's attorney general, the relevant provisions of that state code are briefly discussed, although without a survey response it was not possible to report the experience of such states under these provisions.

---

[106] *See, e.g.*, Ariz. Rev. Stat. § 41-621, *et seq.*; Cal. Gov't. Code § 995; 10 Del. C. §§ 3925 and 4001; Iowa C. § 25A.21; La. Rev. Stat. § 5108.1; Md. Code Ann. § 16C; Mass. Gen. Laws. Ann. ch. 258, §§ 2, 6, and 9; Nev. Rev. Stat. §§ 41.0339 and § 41.0349; N.J. Stat. Ann. § 59.1-1 *et seq.*; Pa. Code § 39.1 *et seq.*; Minn. Stat. § 3.736; Wash. Rev. Code. Ann. §§ 4.92.060, 4.92.070 and § 4.92.130; Wis. Stat. § 895.46.

[107] *See* Cass *supra*, at 1172.

[108] *See, e.g.*, Cal. Gov't. Code § 995; Fla. Stat. §§ 111.071 and 768.28(9)(a); Mass. Gen. Laws ch. 258, § 2; Nev. Rev. Stat. § 41.0339 and 41.0349; N.M. Stat. Ann. § 41-4-1 *et seq.*; Pa. Code § 8521 *et seq.*; Wyo. Stat. § 1-39-101 *et seq.*

[109] *See, e.g.*, Ga. Code Ann. §§ 89-973, 89-974 [O.C.G.A. §§ 45-9-1 through 45-9-5]; N.D. Cent. Code § 32-12.1-15.

[110] *See, e.g.*, Appendix B, Letters to Thomas J. Madden from Attorney Generals of the following states: Alaska, Kansas, Massachusetts, Mississippi, Missouri, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, Utah and Washington. *But see* Letter to Thomas J. Madden from Gerald L. Baliles, Attorney General, Commonwealth of Virginia.

[111] Analysis and comparison of state approaches is incomplete pending the expected imminent receipt of additional responses. All of the responses received to date, along with supplementary materials, are contained in Appendix B. The thoroughness of some state survey responses has facilitated a more extended analysis of some states.

APPENDIX A - LEGISLATIVE BIBLIOGRAPHY

CHRONOLOGY

93rd Congress

H.R. 10439 Sponsored by Rodino, cosponsored by Hutchinson on September 20, 1973. To amend Title 28 U.S.C. to provide for exclusive remedy against the United States in suits based on acts or omissions of United States employees.

September 20, 1973, referred to House Committee on the Judiciary.

September 25, 1973, referred to Subcommittee on Claims and Governmental Relations.

March 27, 1974, hearings before Subcommittee

April 2, 1974, executive comment receive from the Unites States Postal Service.

H.R. 12715 Sponsored by Chappell on February 7, 1974. To amend Title 28 U.S.C. to provide for exclusive remedy against the United States in suits based on acts or omissions of United States employees.

February 7, 1974, referred to House Committee on the Judiciary.

February 11, 1974, referred to Subcommittee Claims and Governmental Relations.

S. 2558 Sponsored by Hruska on October 10, 1973. To amend Title 28 U.S.C. to provide for exclusive remedy against the United States in suits based upon acts or omissions of United States employees.

October 10, 1973, referred to Senate Committee on the Judiciary.

November 15, 1973, referred to Subcommittee Improvements in Judicial Machinery.

April 9, 1974, executive comment received from the Treasury Department.

95th Congress

H.R. 9219 Sponsored by Rodino on September 20, 1977. To amend Title 28 U.S.C. to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees.

September 20, 1977, referred to House Committee on the Judiciary.

September 29, 1977, referred to Subcommittee on Administrative Law and Governmental Relations.

February 23, 1978, first day of Subcommittee hearings.

May 17, 1978, final day of Subcommittee hearings.

July 12, 1978, first day of Subcommittee consideration and markup.

July 20, 1978, final day of Subcommittee consideration and markup.

July 20, 1978, forwarded to full Committee, with amendments.

H.R. 9437 Sponsored by Zeferetti on October 4, 1977. To amend Title 28 U.S.C. to provide for an exclusive remedy against the United States for suits based upon acts or omissions of United States officers, and employees routinely assigned to perform investigative, inspection or law enforcement functions.

October 4, 1977, referred to House Committee on the Judiciary.

October 7, 1977, referred to Subcommittee on Administrative Law and Governmental Relations.

October 27, 1977, executive comment requested from the Agriculture Department, Labor Department, Treasury Department, FTC and FCC.

S. 2117 Sponsored by Eastland on September 16, 1977. To amend Title 28 U.S.C. to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees.

September 16, 1977, referred to Senate Committee on the Judiciary.

September 21, 1977, referred to Subcommittee on Citizens and Shareholders Rights.

December 14, 1977, executive comment requested from the Justice Department.

January 20, 1978, executive comment received from the Justice Department.

January 26, 1978, first day of Subcommittee hearings.

June 15, 1978, final day of Subcommittee hearings.

S. 2868 Sponsored by Percy on April 10, 1978. To provide a remedy against the United States for torts arising under the Constitution or laws of the United States committed by officers or employees of the United States.

April 10, 1978, referred to Senate Committee on the Judiciary.

April 14, 1978, referred to Subcommittee on Citizens and Shareholders Rights.

June 15, 1978, hearings held by Subcommittee.

S. 3314 Sponsored by Metzenbaum on July 18, 1978. To amend Title 28 U.S.C. to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees and to amend Title 5 U.S.C. to permit a person aggrieved by a constitutional injury to initiate a disciplinary inquiry.

July 18, 1978, referred to Senate Committee on the Judiciary.

July 19, 1978, referred to Subcommittee on Citizens and Shareholders Rights.

July 26, 1978, Subcommittee reported measure without amendments to full Committee.

96th Congress

H.R. 193 Sponsored by Chappell on January 15, 1979. To amend Title 28 U.S.C. to provide for an exclusive remedy against the United States in suits based upon acts or commissions of United States employees.

January 15, 1979, referred to House Committee on the Judiciary.

February 27, 1979, referred to Subcommittee on Administrative Law and Governmental Relations.

June 20, 1979, for further action, see H.R. 2659.

H.R. 2659 Sponsored by Rodino on March 3, 1979. To amend Title 28 U.S.C. to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, to provide a remedy against the United States with respect to constitutional torts and to establish procedures whereby a person injured by a constitutional tort may initiate and participate in a disciplinary inquiry with respect to such a tort.

March 6, 1979, referred to House Committee on the Judiciary.

March 14, 1979, referred to Subcommittee on Administrative Law and Governmental Relations.

June 20, 1979, first day of Subcommittee hearings.

August 1, 1979, final day of Subcommittee hearings.

October 4, 1979, executive comment received from the Justice Department.

October 31, 1979, Subcommittee consideration and markup session held.

S. 695 Sponsored by Kennedy on March 15, 1979. To amend Title 28 U.S.C. to provide for an exclusive remedy against the United States in actions based upon acts or omissions of United States employees, and to amend Title 5 U.S.C. to permit a person injured by a constitutional tort to initiate and participate in a disciplinary inquiry of the offending act or omission.

March 15, 1979, referred to Senate Committee on the Judiciary.

March 30, 1979, referred to Subcommittee on the Constitution.

97th Congress

H.R. 24 Sponsored by Danielson on January 5, 1981. To amend Title 28 U.S.C. to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, to provide a remedy against the United States with respect to constitutional torts, to establish procedures whereby a person injured by a constitutional tort may initiate and participate in a disciplinary inquiry with respect to such tort.

January 5, 1981, referred to House Committee on the Judiciary.
February 17, 1981, referred to Subcommittee on Administrative Law and Governmental Relations.

February 25, 1981, executive comment requested from Justice Department, Treasury Department and Office of Personnel Management.

October 13, 1981, subcommittee hearings held (Nov. 5, 1981; May 19, 20, 1982; May 26, 1982).

November 5, 1981, executive comment requested from Department of Defense.

July 29, 1981, subcommittee consideration and markup session held.

August 19, 1982, clean bill H.R. 7034 forwarded by subcommittee to full committee in lieu of H.R. 24.

H.R. 1696 Sponsored by Chappell on February 5, 1981. To amend Title 28 U.S.C. to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees.

February 5, 1981, referred to House Committee on the Judiciary.

February 17, 1981, referred to Subcommittee on Administrative Law and Governmental Relations.

H.R. 6359 Sponsored by Kindness on May 12, 1982. A bill to amend Title 28 U.S.C. to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, to provide a remedy against the United States with respect to constitutional torts, and to establish procedures whereby a person injured by a constitutional tort may obtain a remedy.

May 12, 1982, referred to House Committee on the Judiciary.

May 17, 1982, referred to Subcommittee on Admnistrative Law and Governmental Relations.

H.R. 7034 Sponsored by Hall on August 19, 1982. To amend Title 28 U.S.C. to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, to provide a remedy against the United States with respect to constitutional torts.

August 19, 1982, referred to House Committee on the Judiciary.

For previous action, see H.R. 24.

S. 1775 Sponsored by Grassley on October 26, 1981. To amend Title 28 U.S.C. to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, to provide a remedy against the United States with respect to constitutional torts.

October 26, 1981, referred to Senate Committee on the Judiciary.

November 2, 1981, referred to Subcommittee on Agency Administration.

November 13, 1981, subcommittee hearings held (November 16, 1981 and March 31, 1982).

June 9, 1982, considered by Subcommittee on Agency Administration.

September 23, 1983, subcommittee consideration and markup session held.

Alabama

Unlike many states, Alabama law does not provide for either the defense, indemnification or insurance of government officials and employees in suits arising out of an official's or employee's conduct that is within the scope of employment.

Alaska

According to the Attorney General, Alaska has had very little litigation in which claims under section 1983 have been raised. However, the potential for official liability under section 1983 is viewed as a significant problem. Although Alaska, like most states, has not formally substituted enterprise liability for the personal liability of state officials, various collective bargaining agreements provide for state defense and indemnification of state officials and employees acting within the scope of their authority and responsibilities.

The Attorney General reports that no special or formal disciplinary procedures have been instituted; no formal provisions exist for the defense, indemnification or insuring of state officials; and Alaska has not—except with respect to equal employment—instituted a risk management training program to avoid official or employee misconduct.

Arizona

Arizona has not substituted enterprise liability for the personal liability of officials or employees of the state. However, Arizona, pursuant to Ariz. Rev. Stat. § 41-621, *et seq.*, provides insurance coverage for all officers, agents and employees against liability for acts or omissions of any nature while acting in the course and scope of employment or authorization. Additionally, Arizona law states that a state officer, agent or employee is not personally liable for an injury or damage resulting from his act or omission in a public official capacity where the exercise of discretion is involved and the official acted in good faith without wanton disregard of his statutory duties. *Id.* The Attorney General will defend a state official, agent or employee if self-insurance coverage is also provided. *Id.*

There is no state-wide training program to avoid potential liability under section 1983 actions, although the State's Risk Management Services relating to insurance does provide limited training through specialized seminars usually conducted by the Attorney General's office.

Arkansas

The State of Arkansas will pay actual, but not punitive, damages adjudged or entered as a result of a compromise settlement, approved and recommended by the Attorney General, against officers or employees of the state based on an act or omission by the officer or employee while acting without malice and in good faith within the course and scope of employment and in the performance of his official duties. Ark. Stat. Ann. § 12-3401.

California

California has not substituted enterprise liability for personal liability. According to the Attorney General, the State of California is self-insured. In addition, the state and all of its political subdivisions are required to provide for the defense of an employee or former employee in any civil action based on an act or omission arising out of the scope of his employment. Cal. Gov't Code § 995. In such actions, either the state or the local governmental unit may refuse to defend the employee if he acted or failed to act because of fraud, corruption or malice, or if a conflict of interest would be created as a result of defending the employee. *Id.* § 995.2.

In cases where the state or a local governmental unit defends the government employee, as well as those in which the employee conducts his own defense, the government is required to either pay or indemnify the employee for any judgment, settlement or compromise against him, once it is established that the injury arose out of an act or omission occurring in the scope of employment. *Id.* § 825 *et seq*. California law also authorizes local governmental units to insure any employee against all or any part of his liability resulting from an act or omission in the scope of his employment. *Id.* § 990.

Informal risk management training exists, and the Attorney General keeps agencies informed of recent developments on liability and will, upon request, review and edit employee training manuals.

Colorado

Colorado has not substituted enterprise liability for the personal liability of state officers. The state's insurance policy, however, does provide coverage for actions against state officials and employees under 42 U.S.C. § 1983.

In addition, a public entity—defined to include counties and cities—is required to indemnify an employee for any settlement or judgment against him in an action arising out of injuries due to an act or omission occurring during the performance of his duties and within the scope of employment, except where the employee's acts or omissions were willful or wanton. A public entity, however, is not required to provide for the defense of its employees, but must bear the costs of a defense if the employee's actions occurred within the scope of employment and were not willful or wanton. Colo. Rev. Stat. § 24-10-110 *et seq*.

According to the Attorney General, the state has no risk management training experience regarding official misconduct.

Connecticut

Connecticut law deals with the liability of both state and municipal officers and employees. Conn. Gen. Stat. § 4-165 provides:

> No state officer or employee shall be personally liable for damage or injury, not wanton or wilful, caused in the performance of his duties and within the scope of his employment. Any person having a complaint for such damage or injury shall present it as a claim against the state under the provisions of this chapter.

Similarly, section 7-465 makes local governments liable for damages caused by local officers or employees whose actions meet good faith standards of conduct.

Delaware

Like most states, Delaware has not substituted enterprise liability for the personal liability of state officials or employees. However, according to the Attorney General, Delaware law provides that public officers who act in connection with the determination of policy, in good faith and without gross or wanton negligence, are entitled to be indemnified for any judgment rendered against them and for the cost and expense of litigation, including attorney's fees. Del. Code Ann. tit. 10, § 4001 *et seq.* State officers and employees also have a right to representation. *Id.* § 3925.

The Attorney General did not comment on Delaware's experience with risk management training for officials and employees.

District of Columbia

Although the District of Columbia does not provide for the defense or indemnification of its officers or employees, except in claims relating to an employee's negligent operation of a motor vehicle, D.C. Code Ann. § 1-1211 *et seq.*, the mayor is authorized to settle claims and suits against the District brought under section 1983 and arising out of the negligence or wrongful act of any officer or employee for whose acts the District would be liable if it were a private individual. *See* D.C. Code Ann. § 1-1202(1).

Florida

Although Florida has not adopted enterprise liability as a substitute for official liability, officers and employees of the state and its political subdivisions are not personally liable in state court actions for their tortious acts within the course and scope of their employment so long as their actions do not exhibit bad faith, maliciousness or a wanton and willful disregard of human rights, safety or property. Fla. Stat. §§ 111.071 and 768.28(9)(a). Similarly, in federal civil rights suits under 42 U.S.C. § 1983, the state will pay any judgment entered against a state official unless it is determined that the official intentionally violated the plaintiff's rights. *Id.* §§ 111.071 and 284.38. The state also provides a legal defense for state officers and employees for such law suits arising out of their official duties, *Id.* § 111.07, while political subdivisions have the discretion, in certain cases, to provide for the representation of officials and employees. *Id.* §§ 111.06, 111.065.

Any judgments against state officials and the cost of the defense of such actions are paid from the state's self-insurance trust fund. *Id.* §§ 111.071, 284.30, 284.31. Since the Funds' inception in 1972, Florida has defended 2,524 section 1983 damage actions against state officials at a cost of $2.5 million. The Attorney General points out, however, that this figure is somewhat misleading because it does not include the salary and support services for the assistant attorneys general who devote full time to section 1983 cases.

The Attorney General did not comment on Florida's experience with risk management training.

Georgia

According to the Attorney General, the State of Georgia has established a self-insured indemnity program that provides coverage for state officials and employees. Ga. Code Ann. §§ 89-973, 89-974 [effective November 1, 1982, the State of Georgia is adopting a new code. The new cite will be O.C.G.A. §§ 45-9-1 through 45-9-5]. Local governments may also provide insurance coverage for local public officials and employees. *Id.* § 89-943. Notably, the Georgia State Merit System has a training division which offers courses on public personnel management and instruction on public official and employee liability.

Hawaii

The State of Hawaii has waived its immunity for liability for the torts of its employees and will assume liability to the same extent as a private individual under like circumstances. Hawaii Rev. Stat. § 662-2. However, § 662-2 is not applicable to "any claim based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation." Thus, Hawaii officials sued in connection with the administration of a federal assistance program as interpreted by state law would appear to be subject to personal liability under section 1983. Hawaii Rev. Stat. § 662-15. In most other cases, the Attorney General is authorized to defend any employee of the state in any civil action brought against the employee resulting from an act or omission while acting within the scope of his employment. *Id.* § 662-16. Finally, the State of Hawaii has waived its sovereign immunity and is covered by liability insurance in cases where section 662 is not applicable. *Id.* § 661-1 *et seq.*

Idaho

Idaho's Tort Claims Act, Chapter 9 of the Idaho Code, § 6-903 covers the liability of all governmental employees, including officers, employees and servants of the state and its political subdivisions. In all civil actions, either the state or a political subdivision is liable, with certain exceptions, in lieu of the employee.

Idaho law requires the state to provide a comprehensive liability insurance plan to protect the state and its employees from claims and civil lawsuits. *Id.* § 6-919. Political subdivisions are authorized to purchase the necessary liability insurance for themselves and their employees. *Id.* § 6-923.

Illinois

In 1981, Illinois enacted legislation to provide a program for purchasing liability insurance protection for state employees who act within the scope of their employment. Ill. Ann. Stat., Ch. 127, § 6364. In addition, section 6364 requires the State to defend, indemnify and hold harmless an employee against any claim in tort. *Id.* Chapter 85, § 2-302 of the Ill. Ann. Stat. governs actions against employees of local governments. It provides:

> If any claim or action is instituted against an employee or former employee of a local public entity based on an injury allegedly arising out of an act or omission occurring within the scope of his employment as such employee, the entity may elect to do any one or more of the following:
>
> a) Appear and defend against the claim or action;
> b) Indemnify the employee or former employee for his court costs incurred in the defense of such claim or action;

> c) Pay, or indemnify the employee or former employee for a judgment based on such claim or action, or
> d) Pay, or indemnify the employee or former employee for, a compromise or settlement of such a claim or action.

Indiana

Chapter 16 of the Ind. Code Ann. covers the liability of government employees of the State and its political subdivisions. With respect to indemnification and defense of employees, section 34-4-16.5-5 provides that the ''governmental entity shall pay any judgment, compromise, or settlement of a claim or suit against an employee when the act or omission causing the loss is within the scope of his employment, regardless of whether the employee can or cannot be held personally liable for the loss and when the governor, in the case of a claim or suit against a state employee, or the governing body of the political subdivision, in the case of a claim or suits against an employee of political subdivision, determines that paying the judgment, compromise, or settlement is in the best interest of the governmental entity.''

Section 34-4-16.5-18 permits a governmental entity to purchase insurance to cover the liability of itself or its employees. Sections 34-4-16.7-1 and .7-2 relate specifically to the personal civil liability under civil rights laws of employees acting within the scope of employment and the defense of such employees for claims or suits arising under civil rights laws.

Iowa

The Attorney General reports that the most relevant Iowa statute bearing on the question of official liability is Iowa Code § 25A.21 (1981), part of the Iowa Tort Claims Act, which provides:

> The state shall defend and, except in cases of malfeasance in office or willful and wanton conduct, shall indemnify and hold harmless any employee of the state against any claim as defined in section 25A.2, subsection 5, paragraph 'b', including claims arising under the Constitution, statutes, or rules of the United States or of any state.

As with California and Florida, Iowa law also provides protections for local officials pursuant to the Municipal Tort Claims Act, Iowa Code § 613A.8 (1981).

Under these statutes government attorneys defend state and local officials sued for damages pursuant to section 1983. The indemnity provisions, however, are basically limited to negligence claims and do not extend to claims grounded in ''willful and wanton conduct.'' In addition, the indemnity provisions of Iowa law are largely inapplicable to section 1983 damage awards because such provisions are limited to negligence claims. No general insurance program is provided or available to state employees for such risks, although the universities may have policies that would cover some such claims. But the Iowa State Association of Counties has developed a reinsurance program in which many counties participate that would cover many claims arising out of law enforcement activities. However, such coverage does not extend to the full range of section 1983 exposure.

Although that language has not been authoritatively construed by the Iowa Supreme Court, the Attorney General is of the view that section 1983 cases in which damages could be recovered against state officials would involve ''willful and wanton conduct,'' and would thus preclude indemnification.

The State of Iowa also self-insures against most risks and is developing a fairly comprehensive risk management program, but this program has not focused significantly as yet upon issues of personal liability for official misconduct.

While there have been no major damage awards against state officials in Iowa, several pending cases involve damage claims against correctional officers at penal institutions for alleged assaults against inmates. Were those to be successful, the officers would be personally liable for the damages.

Unlike most states, Iowa law establishes procedures for disciplining employees who violate a person's constitutional rights at penal institutions, including suspension and discharge. While such procedures have been found useful in preventing such violations, they are not considered a ''substitute'' for damages in the sense that their existence would be a defense to an allegation of past violations by the persons directly responsible.

Iowa has instituted a variety of training programs, especially in the law enforcement and corrections area, to insure that these functions are performed according to constitutional and statutory requirements.

The Attorney General of Iowa made the following observations with respect to official liability. First, it is questionable, in his opinion, whether states could or should adopt enterprise liability to address the problem of section 1983 damages for official misconduct, either by way of direct indemnification or purchase of insurance at government expense. Rather, Congress could substitute a system of governmental liability for personal liability by expressly overriding the eleventh amendment pursuant to section 5 of the fourteenth amendment. Another possibility would be the development of appropriate insurance coverage to be purchased at their own expense by government officials.

Second, Congress should also consider ''fine tuning'' sections 1983 and 1988 to express more precisely the types of matters and the degree of risk to which it wishes to expose state governments and state officials. With respect to attorneys' fees in particular, while there is clearly an important role for such awards in true civil rights/civil liberties cases, section 1988 occasionally creates unfortunate distortions in the conduct of government litigation. The vague terms in which Congress has expressed itself afford countless opportunities for creative counsel to expand the frontiers of official liability. For example, the State of Iowa has been defending against a claim for fees in the hundreds of thousands of dollars in a case in which a very large corporation successfully challenged as an undue burden on commerce an Iowa statute which limited the length of twin-trailered vehicles operating on its highways.

Kansas

According to the response of the Attorney General, Kansas has not instituted any insurance or indemnity programs, and does not provide for the defense of state officers or employees.

Kentucky

The Commonwealth of Kentucky has adopted enterprise liability to the extent that it will compensate persons for damages—up to $50,000—sustained as a proximate result of the negligence of any officer or employee of the state while acting within the scope of employment. Ky. Rev. Stat. § 44.070.

The Commonwealth also provides liability insurance to certain public officers and employees, among them full-time public advocates, Ky. Rev. Stat. § 31.025, members of governing boards and faculty and staff of each state institution of higher education, Ky. Rev. Stat. § 164.2871, and members of the State Fair Board, Ky. Rev. Stat. § 247.140. According to the Kentucky Attorney General, several bills to provide liability insurance for other public employees, including the Attorney General and his staff attorneys and investigators, have failed. In 1976, the Kentucky legislature enacted a statute providing that the Commonwealth would defend civil actions against state employees arising out of acts made in the scope and course of employment. The Kentucky Supreme Court, however, invalidated the act in an unpublished opinion in 1980.

According to the Attorney General, Kentucky has no disciplinary procedures designed to correct or reduce instances of official or employee misconduct and no risk management practices. The Commonwealth does provide some training to its officials and employees regarding affirmative action, equal employment opportunity, and discrimination.

Louisiana

Louisiana has not substituted enterprise liability for the personal liability of state officials or employees. However, the state will save harmless and indemnify all officers and employees of the state from any financial loss arising out of any claim, demand, suit or judgment in any court, including federal court pursuant to a claim under 42 U.S.C. §§ 1981–83 by reason of alleged negligence or other act, provided that the officer was acting in the discharge of his duties and within the scope of his employment, and that such damages did not result from the willful and wrongful act or gross negligence of such officer. La. Rev. Stat. Ann. §§ 13:5108.1 and .2.

These sections of the Louisiana Code do not limit or modify the rights and obligations of any insurer under any policy of insurance. The Attorney General assumes control of the defense of the officer, unless *inter alia*, the Attorney General or the attorney for the employing department determines that the officer was not acting in the discharge of his duties, or that he was acting in a willful or wanton manner or was grossly negligent. Notably, according to the Attorney General, individual state agencies provide training to their officers and employees as desired, necessary and practical. The Attorney General has provided certain training on a statewide basis, including instruction concerning 42 U.S.C. § 1983 for all justices of the peace, and on the Louisiana Administrative Procedure Act for all state regulatory bodies.

Maine

The Tort Claims Act of the State of Maine, Chapter 741 of Me. Rev. Stat. Ann. § 8103(3), limits the liability of employees of the state to a maximum damage award of $10,000. In cases where the employee is found liable, the provisions of section 8116 would apply, which provides for state purchase of insurance on behalf of its employees to insure them against any personal liability which they may incur out of or in the course and scope of their duties. Section 8112 governs the defense and indemnification of local officers and employees and authorizes a governmental entity in its discretion and with the consent of the employee, to assume the defense of and indemnify any employee against a claim which arises out of an act or omission occurring within the course or scope of his employment.

Maryland

In 1979, the Maryland General Assembly enacted Article 78, § 16C of the Annotated Code of Maryland in an attempt to deal with some of the problems relating to the liability of state officials for money damages under section 1983. That section provides for the indemnification of a state officer or employee for . . . any settlement or judgment rendered against him, so long as the act or omission which formed the basis for liability occurred during the performance of his duties and in the scope of his employment, and did not amount to gross negligence and was done without malice.

The legislative findings supporting section 16C are a salient example of the Maryland Assembly's acknowledgement of the need to protect state officials and employees from personal liability. That section provides, in part:

> Recent court decisions throughout the country have created new grounds of personal liability of public officers and employees accruing from the discharge of their public duties. As a result it is becoming increasingly difficult to recruit and retain qualified personnel to serve in public positions that involve either the exercise of discretion or dealing with the public at large; and it has also become increasingly difficult and expensive to protect such officers and employees through public liability insurance.
>
> As a matter of State policy, it is essential to protect State officers and employees, when acting within the scope of their public duties and responsibilities, from liability except for instances of malicious conduct or gross negligence.

In addition to section 16C, in Chapter 298 of the Laws of 1981, the General Assembly waived the immunity of the state and state employees in certain tort actions and provided that the State Treasurer provide self-insurance sufficient to cover the liability of the state and its employees. Finally, Maryland has instituted a number of formal and informal training sessions to avoid official misconduct that could give rise to such liability. For example, attorneys representing the state universities have conducted sessions outlining appropriate procedures to be followed by university officials in attempting to avoid liability for allegedly unconstitutional firing, hiring and tenure decisions.

Massachusetts

Since 1978, Massachusetts has had legislation eliminating personal liability of officers and employees of the Commonwealth and its political subdivisions. In cases where a government official or employee is sued for a negligent or wrongful act or omission occurring within the scope of his office or employment, a suit against the governmental employer is the ''exclusive'' remedy. Mass. Gen. Laws Ch. 258, § 2. Commonwealth officials remain personally liable for their own intentional torts, as well as for civil rights violations under state and federal laws. However, section 9 of chapter 258 also authorizes the indemnification of Commonwealth employees from personal financial loss and the costs of attorneys' fees in an amount up to $1,000,000, in cases where the Commonwealth retains its sovereign immunity, and the official or employee was acting within the scope of his duties or employment.

Massachusetts has had limited experience with risk management training in the area of section 1983. The Attorney General notes that the Commonwealth has been very fortunate in that only a few cases so far have resulted in damage awards against individual Commonwealth officials, and that even those awards have been relatively small.

Michigan

The State of Michigan may, but is not required, to indemnify or provide a defense against liability for officers and employees who are sued under 42 U.S.C. § 1983, where the conduct involved falls within that official's course of employment and scope of authority. Mich. Comp. Laws § 691.1408.

The Attorney General reports that in an effort to reduce liability under 42 U.S.C. 1983, his office continually counsels client agencies to improve their understanding of their legal obligations and the rights which citizens enjoy.

Minnesota

Under Minnesota's tort claims statute, Minn. Stat. Ann. § 3.736(9), the state ''shall defend, save harmless, and indemnify any employee of the state against expenses, attorney's fees, judgments, fines and amounts paid'' in connection with any tort claim arising out of an act or omission if the employee was acting within the scope of his employment. However, Minnesota's exclusion of liability for ''any loss of benefits or compensation due under a program of public assistance or public welfare,'' *Id.* § 3.736(3)(i), should be reconsidered in light of recent Supreme Court interpretation of section 1983 liability.

According to the Attorney General, the state has not undertaken to provide risk management training for officials and employees.

Mississippi

The State of Mississippi, based upon the response of the Attorney General, appears not to provide for either the defense or indemnification of government officials and employees. Instead, official bonds are required to be taken out by office holders in order to exercise the duties and functions of their respective offices. In the application for these bonds, there is typically an indemnification agreement wherein the individual that is seeking the bond has to sign a document that guarantees that he will indemnify the bonding company against any losses, attorneys' fees, court costs, etc., that may be incurred in the defense of the bonding company in any action that may be filed against the official and the bonding company.

As a result of section 1983 actions being filed against state officials who have bonds, even in cases where the officials prevailed in their defense, there have been cases in which cross claims have been filed against the individuals by the bonding company for indemnification for attorneys' fees and costs that for the bonding company. According to the Attorney General, in one case, the face value of the bond was only $50,000, but the bonding company came back, after a successful defense on behalf of the officials by the State Attorney General's Office, and sought $57,000 in attorneys' fees and costs from the state official who had the bond. Thus, the Attorney General notes that the bond approach has not only turned out to be worthless, but also has become a liability in certain types of actions.

Missouri

Missouri has not substituted enterprise liability for the liability of state officials or employees. However, according to the Attorney General, the response of the State of Missouri to the increasing number of lawsuits affecting the personal liability of state officers and employees for money damages has been to intensify its legal efforts in defending such lawsuits and by creating a tort defense fund for certain employees to pay judgments entered against them. Mo. Rev. Stat. § 105.710. The fund will provide a maximum payment of $100,000 where the official acted "in connection with [his] official duties." The Attorney General will defend specified state officials and employees whom he has determined were acting in connection with their official duties.

With regard to risk management training, Missouri has enacted a minimum police standards bill providing for the selection and training of police officers. Mo. Rev. Stat. Chapter 590 (1978). In regard to suits by inmates of the state's correctional system against correctional personnel, there has been instituted an inmate grievance procedure which department personnel feel does cut down on the number of lawsuits filed.

Montana

Subject to certain limitations, every governmental entity is subject to liability for the torts of its employees. Mont. Code. Ann. § 2-9-102. In such cases, § 2-9-305(2) of the Annotated Code of Montana provides that in an action brought against any employee of a state, county, city, town, or other governmental entity for a negligent act, error, or omission or other actionable conduct of the employee committed while acting within the course and scope of his office or employment, the governmental entity or employer shall be made a party defendant to the action. In addition, in any action in which a governmental entity employee is a party defendant, the employee shall be indemnified by the governmental entity employer for any money judgments or legal expenses to which he may be subject as a result of the suit, unless the conduct upon which the claim is brought did not arise out of the course and scope of his employment or is an intentional tort or felonious act of the employee. *Id.* Liability is, however, effectively limited to $300,000 per plaintiff and $1,000,000 total for all persons injured by an instance of actionable conduct, according to the Montana Department of Administration. Mont. Code Ann. § 2-9-104.

The State self-insures for liability risks, except for automobile liability for which it obtains commercial insurance, Mont. Code Ann. § 2-9-201, and political subdivisions are authorized to self-insure similarly, *id.* § 2-9-211. With respect to 42 U.S.C. § 1983 actions, however, the Montana Department of Administration reports that the state has neither commercial nor self-insurance to cover liability. The state Department of Administration plans to seek legislation in 1983 providing for self-insurance for the state for § 1983 claims. The state will provide a defense for officials and employees sued for acts arising in the scope of their employment.

Montana has no disciplinary procedure that automatically comes into play when the state defends or indemnifies an official. Separate state official misconduct statutes, though, punish those who commit egregious acts. Montana conducts seminars and training programs for state employees in the areas of affirmative action, equal opportunity, and grievances.

Nebraska

The Attorney General reports that although Nebraska only recently instituted a limited indemnity program for state employees, Neb. Rev. Stat. § 81-8, 239.05, it has already indemnified employees of the state for two judgments rendered under section 1983. In addition, the Attorney General is required to defend any state officer, employee or agent if the action arose out of an act or omission occurring in the course and scope of employment, except that no defense is required if the act or omission amounted to malfeasance or a willful or wanton neglect of one's duty. *Id.* § 81-239.06.

Nebraska's Department of Correctional Services has on-going training in areas which might create liability under section 1983. The Attorney General was unaware of whether any other agencies of the State of Nebraska presently have specific training programs for liability under section 1983.

Nevada

Although Nevada has not adopted enterprise liability, the state has enacted comprehensive legislation to deal with the problem of liability under section 1983. Chapter 41 of Nev. Rev. Stat., § 41.0339, obligates the Attorney General to defend public officers and employees of the state and its political subdivisions in "any civil action" involving activities performed with the scope of an officer's or employee's public duties. Pursuant to Chapter 41, the Attorney General reports that he has defended many public officers and employees in lawsuits initiated pursuant to 42 U.S.C. § 1983.

The obligation of the state and its local governments to indemnify public officers or employees found liable in section 1983 litigation is covered by section 41.0349, which requires indemnification except in situations where (1) the person has failed to submit a timely request for defense; (2) the person has failed to cooperate in good faith in the defense of the action; (3) the act or omission of the person has been adjudicated not to be within the scope of his public duty; or (4) the act or omission of the person was wanton or malicious. Nevada law also permits the state and any local government to insure itself or any of its officers or employers against liability. Nev. Rev. Stat. § 41.038. The Attorney

General did not comment on Nevada's experience with risk management training.

New Hampshire

Chapter 99-D:2 of the N.H. Rev. Stat. Ann. provides that "if any claim is made or if any civil action is commenced against a present or former . . . official or employee of the state," the Attorney General shall defend such person or retain outside counsel to defend such person if he determines that the "acts complained of were committed . . . while acting within the scope of official duty and that said acts were not wanton or reckless." In such cases, the state is required to "indemnify and hold harmless such person" for any costs, damages, awards, judgments or settlements. The state is also self-insured. *Id.* § 99-D:3.

The Attorney General reports that although his office has not instituted any sort of risk management training, there are several courses being offered by the state for different types of state officials.

New Jersey

While New Jersey has not adopted enterprise liability, the extent of liability of officials or employees of the state is governed by the New Jersey Tort Claims Act, N.J. Stat. Ann. § 59:1-1 *et seq*. Under the Act, either a public entity or public employee or official may have liability for money damages. The Act does provide that a state employee will be indemnified for any judgment rendered against him, *id.* § 10-1, including claims under 42 U.S.C. § 1983, for all actions taken within the scope of employment and not involving actual malice, fraud, willful misconduct or the commission of a crime. In no event may an employee be indemnified for an award of punitive damages. *Id.*

The Tort Claims Act also provides for the defense by the Attorney General of any employee or former employee of the state in "any action" brought on account of an act or omission in the scope of employment which did not amount to "actual fraud, willful misconduct or actual malice." *Id.* § 59-10A-1, -2. The Act governs the liability of all public entities in the State of New Jersey; however it only provides for and mandates defenses and indemnity by the State of its own employees. Public employees of other governmental entities such as counties and municipalities do not receive mandatory representation and indemnification but each such public entity may elect to provide same. A judgment against a public entity under the Tort Claims Act bars a judgment against a public employee for the same conduct and *vice versa*.

The Attorney General reports that there are presently no statistics available which would assist in making an analysis of judgments paid by the state or other public entities generally as a result of official misconduct. While it may be possible to identify civil rights suits filed against the state or state employees, they have not been catalogued by the nature of the allegations made. The Attorney General noted that most suits filed under 42 U.S.C. § 1983 have consisted of claims by prisoners, claims for money damages and injunctive relief in corrective mental health treatment, and claims for damages based upon alleged wrongdoing by law enforcement personnel.

According to the Attorney General, there is an active relationship between his office and the state agencies and officials being represented which provides counsel to these individuals on the latest legal developments and identifies conduct which may lead to liability. However, there are no formal statewide training programs addressed to avoiding or identifying official misconduct. Law enforcement agencies typically do have training programs which include consideration of the constitutional right of individuals.

What may be significant to the successful administration of federal assistance programs in New Jersey is the Attorney General's emphasis of two problems the state faces in defending or settling claims under 42 U.S.C. § 1983. The first is the reluctance of the courts to defer to state law on judicial and administrative proceedings and the second problem is that of attorneys' fees. With regard to the latter, two problems have occurred. The state has found that attorneys' fees have been awarded with only a limited review by the court of the amounts claimed such that these fees not only compensate a plaintiff's attorney but enrich him while the courts utilize the awarding of fees as a punitive measure. The result, according to the Attorney General, is that fee awards are excessive, and probably exceed the fees which would be charged to a client in any given case. In many cases, compensatory damages are non-existant or nominal but attorneys' fees are determined to be several orders of magnitude times the compensatory damages. This is so even where no substantial non-compensatory statutory or constitutional right is vindicated. Furthermore, the Attorney General reports that at least one federal judge in this District has taken the position that attorneys' fees cannot be the subject of a settlement between the parties as part of a settlement of all outstanding claims because of a perceived conflict of interest on the part of plaintiff's attorney. As a result, it has been very difficult to settle some cases, especially where the state is settling to avoid litigation and believes there is a serious issue as to whether a constitutional right has been violated.

New Mexico

The State of New Mexico, like California, Florida and Iowa, provides for the comprehensive coverage of officials and employees of both the state and its political subdivisions. *See* New Mexico Tort Claims Act, N.M. Stat. Ann. §§ 41-4-1 through 41-4-29 (1979). The obligation to defend and indemnify both present and former government officials and employees is contained in § 41-4-4(c), which provides:

> When liability is alleged against any public employee for any torts alleged to have been committed within the scope of his duty, or for a violation of property rights or any rights, privileges or immunities secured by the Constitution and laws of the United States or the constitution and laws of New Mexico, the governmental entity shall provide a defense and pay any settlement or judgment. If an insurance carrier provides a defense to any public employee sued, the duty to defend imposed by this subsection shall be deemed to have been satisfied.

The Attorney General did not comment on the state's experience with risk management training.

New York

A telephone interview with an Assistant Attorney General of New York revealed that N.Y. Pub. Off. Law, Book 46, § 17, establishes a system for the defense and indemnification of state officers and employees who act within the scope of employment and are subsequently sued under section 1983. These protections are not available, however, to an officer or employee whose actions are determined to have been intentionally wrong or reckless.

North Carolina

North Carolina has not adopted enterprise liability. However, upon request, the Attorney General may, but is not required to, provide for the defense of any civil action brought against an employee or former employee in his official or individual capacity on account of an act or omission made in the scope and course of his employment as a state employee. N.C. Gen. Stat. § 143-300.3. In addition, § 143-300.6 provides, in part, that "all final judgments . . . against State employees in actions or suits . . ., or any amounts payable under a settlement . . ., shall be paid by the" authority which employs or employed the state employee.

North Dakota

North Dakota has not adopted enterprise liability, but authorizes the state agencies to insure against liability for any state employee. *See* N.D. Cent. Code, § 32-12.1-15. The Attorney General is required to defend any state employee for "alleged negligence within the scope of employment" when liability insurance coverage is not available. The Attorney General reports that the trend in North Dakota is toward the purchasing of liability insurance. North Dakota law also authorizes political subdivisions to purchase insurance coverage, *id.*, and requires that political subdivisions defend and indemnify employees for negligent acts or omissions which cause injury and which arise out of the scope of employment. *Id.* § 32-12.1-03.

Ohio

According to the Attorney General, the potential liability of state officers and employees for good-faith actions performed within the scope of their official responsibilities or employment has been a perplexing problem facing the State of Ohio for some time. In the last eight years alone, the Ohio General Assembly has enacted several pieces of legislation which contain "solutions" to the problem.

In 1974, the General Assembly enacted House Bill 800 which effectuated the waiver of sovereign immunity contained in Article I, Section 16 of the Ohio constitution and created a court of claims having exclusive original jurisdiction over all civil actions for damages filed against the State of Ohio. Chapter 2743, Ohio Rev. Code Ann., contains the statutory provisions relating to the state officers and employees to be joined with the state as defendants in actions filed in the court of claims. It was believed that plaintiffs would join the state officers and employees with the "deep-pocket" defendant, the state, instead of pursuing the individuals in separate actions filed in the common pleas courts of the state. Indeed, most plaintiffs either sued only the state or joined the individuals with the state in actions filed in the court of claims. Almost uniformly when the court of claims rendered a judgment in favor of the plaintiffs it was issued only against the state or its named department and not against the individuals that had been joined as defendants. Thus, for a while, the initial legislative scheme provided some protection for state officers and employees.

However, plaintiffs quickly learned of the conservative nature of the court of claims and began filing civil actions against individual officers and employees in common pleas court and/or civil rights actions against the individuals in federal court in addition to filing an action against the state in the court of claims. The initial legislative response to this development came in the summer of 1975 when the General Assembly enacted legislation allowing specific state entities to purchase liability insurance covering the acts of their officers and employees. The amendment to section 2743.02, Ohio Rev. Code Ann., contained in House Bill 682 is illustrative of this initial response.

Liability insurance for some state entities proved to be a prohibitively expensive remedy to the problem. As an alternative solution, the General Assembly began to enact legislation permitting specific state entities to indemnify directly their officers and employees.[112]

In an effort to eliminate the separate common pleas court actions against individuals, the General Assembly enacted Amended Substitute House Bill 149 in 1977, which again amended Section 2743.02, Revised Code, to read:

> (A) The state hereby waives, in exchange for the complainant's waiver of his cause of action against state officers or employees, its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. To the extent, that the state has previously consented to be sued, this chapter has no applicability.
>
> Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any state officer or employee, the waiver shall be void if the court determines that the act or omission was not within the scope of the officer's or employee's office or employment.
>
> * * * * *
>
> (E) The only defendant in original actions in the court of claims is the state. The state may file a third-party complaint or counterclaim in any civil action except a civil action for one thousand dollars or less, that is filed in the court of claims.

The Amended Substitute House Bill 149 waiver has markedly reduced the number of separate common pleas court actions brought against individual state officers and employees. However, the waiver coupled with the aforementioned conservative nature of the court of claims has resulted in some plaintiffs electing to forego an action against the state in the court of claims and to pursue only a common pleas court action against the individual state officer or employee.

---

[112] *See* Amendment made to Section 2743.02(C), Ohio Rev. Code Ann., by Amended Substitute House Bill 1192, accompanying the Attorney General's response in Appendix B.

The Amended Substitute House Bill 149 waiver could not and did not affect actions brought in federal court based upon the alleged violation of federal constitutional rights by state officers and employees. By 1979, the number of pending section 1983 actions had increased to the point that the Attorney General organized a new federal litigation section to handle only section 1983 actions. Also, by 1979, a number of bills seeking to give various state entities the authority to purchase liability insurance and/or indemnify directly their officers and employees were pending before the General Assembly. A new "solution" was clearly needed.

On February 19, 1980, the General Assembly enacted Amended Substitute Senate Bill 76[113] in the hope of finding a comprehensive solution to the problem. The major provisions of Amended Substitute Senate Bill 76 are:

1. The immunity of state officers and employees in civil actions for damages arising under the laws of the State of Ohio. Section 9.86, Revised Code.
2. The indemnification of state officers and employees from judgments and settlements in civil actions arising under the laws of the United States and the laws of a foreign jurisdiction. Section 9.87, Revised Code.
3. The defense of state officers and employees by the Attorney General when certain conditions are met. Sections 109.36 through 109.366, Ohio Rev. Code Ann.

The Attorney General reports that during the two years since their passage, the provisions of Amended Substitute Senate Bill have effectively protected state officers and employees from liability in and the expenses of defending against civil actions based on good-faith actions taken in the course of their official responsibilities or employment.

Oklahoma

Oklahoma law provides for the defense and indemnificaiton of officers and employees of both the state and its political subdivisions, who act in good faith in the course of employment. Okla. Stat. Ann. tit. 74, § 20(f) and tit. 51, §§ 160 through 162.

Oregon

Section 30.260 *et seq.* of Or. Rev. Stat., entitled "Tort Actions Against Public Bodies," provides a comprehensive system for defending and indemnifying officers, employees and agents acting within the scope of their employment or duties. Oregon law also permits local governments to procure insurance against liability. *Id.* § 30.282.

Pennsylvania

Pennsylvania has not adopted enterprise liability, and the Attorney General reports that most civil rights suits against Commonwealth employees are in the area of inmate suits directed against correction officials. The Commonwealth's

---

[113] A copy of this bill is included in Appendix B.

Employee Liability Self-Insurance Program (ELSIP) is designed to fund from departmental appropriations the payment of expenses and judgments arising out of section 1983 cases. In addition, the Commonwealth will defend and indemnify, pursuant to the provisions of its code of regulations, Pa. Code § 39.1 *et seq.*, Commonwealth employees and officials who are sued for alleged negligence or other unintentional misconduct occurring while in the scope of employment.

Political subdivisions of the Commonwealth are required, in certain cases, to defend and indemnify local government employees in actions arising out of an injury caused by the employee while within the scope of his office or duties. 42 Pa. Code § 8521 *et seq*. Pennsylvania law authorizes local governments to self-insure. *Id.* § 8564.

Interestingly, the Attorney General reports that the Commonwealth's ultimate monetary exposure to civil rights liability is very small and that, therefore, there is no ongoing systematic and comprehensive training to avoid official misconduct. All of the larger departments of Pennsylvania government do, however, have legal staffs and it is their duty to make employees aware of the proper legal manner in which to conduct their duties and this advice is given, *inter alia*, to insure compliance with all statutes and the Constitution. In particular, the Commonwealth's corrections officials are thoroughly trained before beginning assignments, and this training includes lectures and briefings by legal staff on constitutional legal policies. Similarly, the state police include lectures and briefings on this subject in their ongoing training programs. Also, upon the implementation of section 504 of the Rehabilitiation Act of 1973 and its regulations relating to the handicapped (45 C.F.R. § 84.1), special educational sessions and briefings were arranged so that Commonwealth government would be in compliance with those regulations.

The Attorney General did note one particularly significant experience of the Commonwealth as a result of its enactment several years ago of a limited waiver of sovereign immunity for eight classes of torts, 42 Pa. Cons. Stat. § 8521 *et seq.*, and a later similar enactment as to local governments. The Attorney General believes this legal remedy reduced the number of civil rights actions. That is, when the Commonwealth enjoyed complete sovereign immunity, many persons affected by tortious conduct of officials would style those obvious tort cases as civil rights actions in federal court. Now that in fact Pennsylvania has an improved torts claim procedure, those types of civil rights cases have been reduced.

Rhode Island

Section 9-31-8 of R.I. Gen. Laws provides for the defense of state employees in any action brought on account of an act or omission that occurred within the scope of his employment. The Attorney General may, however, refuse to defend in certain enumerated situations which are determined to exist. *Id.* § 9-31-9. The State has discretion to indemnify any employee up to $50,000, if a judgment is rendered against the employee.

South Carolina

Based upon the limited response of the Attorney General, South Carolina appears to have no formal system for the defense or indemnification of state officials and employees in actions under section 1983. However, the State does provide very limited insurance coverage for certain torts. In addition, the Attorney General reports that South Carolina has not instituted any risk management training regarding official misconduct.

South Dakota

The Attorney General reports that South Dakota is just beginning to see the liability effects of 42 U.S.C. § 1983. One of the steps the state has taken concerning this liability is to purchase insurance coverage specifically for section 1983 liability.

Tennessee

The "Tennessee Governmental Tort Liability Act," Tenn. Code Ann. § 29-20-205 *et seq.*, governs the liability of governmental entities of the State of Tennessee for injury proximately caused by a negligent act or omission of any employee within the scope of employment, except for an injury that "arises out of the exercise or performance or the failure to exercise or perform a discretionary function." According to section 29-20-310(b):

> No claim may be brought against an employee or judgment entered against an employee for damages for which the governmental entity is liable under this chapter unless the amount of damages sought or judgment entered exceeds the minimum limits set out in § 29-20-404 or the amount of insurance coverage actually carried by the governmental entity, whichever is greater, and the governmental entity is also made a party defendant to the action.

Under section 29-20-406, local governments may insure their employees against liability.

Texas

The State of Texas does not defend or indemnify public officials or employees, although the state is self-insured. The Attorney General reports that his office has conducted seminars, but not training sessions, and keeps state agencies apprised of changes or trends in the law and what conduct has been viewed as violative of section 1983.

Utah

The State of Utah has not adopted enterprise liability. However, Utah Code Ann., § 63-48-1 *et seq.*, provides for the indemnification of public employees for acts committed during the performance of their duties, within the scope of their employment, or under color of authority, so long as the act did not occur because of gross negligence, fraud or malice. Within the last year and a half, the State of Utah has instituted a self-insurance program, which covers both state agencies and state employees, up to the statutory limits of liability that may be recovered against the state and its employees for acts committed within the scope of employment.

Vermont

Title 12, § 5601 *et seq.* of the Vt. Stat. Ann., makes the state liable for "injury caused by the negligent or wrongful act or omission of an employee of the State while acting within the scope of his office or employment." Vermont has purchased, pursuant to sections 1401–06 of Title 29, Vt. Stat. Ann., a general liability insurance policy to cover those instances where section 5601 does not provide protection for state employees, the most notable of which is "any claim based upon an act or omission of an employee . . . exercising due care, in the execution of a statute or regulation, . . . or based upon the exercise or performance of a discretionary function or duty on the part of a state agency."

The Attorney General reports that Vermont has not instituted any formalized training to avoid official misconduct.

Virginia

The Commonwealth of Virginia still recognizes the common-law doctrine of sovereign immunity as a bar to tort liability of the Commonwealth, its agencies, and officials. The recent Virginia Supreme Court decision in *James v. Jane*, 221 V. 43 (1980) summarizes Virginia law concerning tort liability of commonwealth officials. Under *James v. Jane*, Commonwealth officials are immune from liability for negligence where: (1) the official is acting within the scope of his official duties; (2) his duties involve substantial discretion; (3) the official's duties involve an activity in which the Commonwealth has a substantial governmental interest; and (4) the Commonwealth exercises significant control of the official's duties.

Virginia officials, of course, are subject to suit in federal court under 42 U.S.C. § 1983 and, therefore, have potential personal liability arising out of their employment. This potential exposure has prompted Virginia to address the question of official liability through insurance and preventive measures described below.

Effective July 1, 1982, the Virginia Tort Claims Act ("Act"), Va. Code § 8.01-195.1 *et seq.* waives the sovereign immunity of the Commonwealth for tort liability up to $25,000.00 or an amount equal to the effective limits of any applicable liability insurance coverage, whichever is greater. This Act applies prospectively and only to the liability of the Commonwealth itself. It does not affect the sovereign immunity of Commonwealth officials. Thus Virginia has provided a limited remedy for some claims not recoverable from the employee or official responsible.

In 1973, the Virginia Attorney General proposed and assisted in obtaining for the Commonwealth a master insurance policy covering liability of state employees and officials. This master policy is available to any commonwealth agency on a voluntary basis. Agencies pay separate premiums based upon the number of employees covered and the liability risks associated with the agency's responsibilities. Of the approximately 135 separate commonwealth agencies, boards, commissions, and other commonwealth governmental entities, 65 such entities are presently covered by the master insurance policy. The policy covers negligent and wrongful acts of Commonwealth officials and clearly insures against potential liability of officials sued under 42 U.S.C. § 1983. Liability for punitive damages in excess of $1,000.00, per occurrence, per employee, is expressly excluded from policy coverage.

A number of Virginia agencies not covered by the above described master policy have comprehensive general liability insurance policies which specifically include negligent personal injury liability. These policies usually exclude coverage for wrongful acts and, therefore do not cover liability under 42 U.S.C. § 1983.

Virginia, unlike many states, has an Office of Risk Management which was established in 1980 as a part of the Department of General Services. Initially, the primary responsibility of the Office was insurance protection of commonwealth-owned real property and buildings.

The responsibilities of the Office have been broadened by 1982 legislation, authorizing the establishment of an insurance plan for the liability of the Commonwealth, its agencies, officials and employees. This insurance program will be established, in part, to provide coverage for potential liability of the Commonwealth as a result of the new Virginia Tort Claims Act.

The Office of Risk Management has no comprehensive records of the number or size of claims made or judgments paid under existing commonwealth insurance programs. This is due, in part, to the fact that the Office itself has existed only since 1980. There has been no requirement that agencies report such information to any centralized record keeping system. This Office has recently suggested to officials of the Office of Risk Management the importance of developing state-wide risk management information for future use.

Since the early 1970's the Virginia Department of Personnel and Training has conducted regular programs relating to affirmative action requirements, equal employment opportunity, and human relations management. Training has been provided to agency heads and their supervisory personnel in a workshop setting. These workshops typically include informative speakers, question and answer sessions, and distribution of written materials. According to the Attorney General, this training is designed to promote lawful employment procedures and to avoid possible official liability.

Washington

Washington has not substituted enterprise liability for official liability. However, the state, pursuant to Wash. Rev. Code §§ 4.92.060 and .070, provides for the defense and indemnification of state officers and employees in situations where such officers' and employees' ''acts or omissions were, or purported to be in good faith, [and] within the scope of [their] official duties.'' In addition, the state has established a tort claims fund which pays all claims covered by section 4.92.070. *See* Wash. Rev. Code § 4.92.130. The Attorney General reports that some state agencies have had limited risk management training experience.

West Virginia

Enterprise liability has not been substituted for official liability. However, according to the Attorney General, all of West Virginia's state officials are covered by insurance for section 1983 personal liability. In addition, W. Va. Code § 8-12-7 permits local governments to purchase liability insurance coverage for local public officials and employees.

The West Virginia Department of Corrections has for about four years been offering correctional officer training at the West Virginia State Police Academy.

However, such training is not specifically addressed by legislation in West Virginia and funds have become increasingly scarce. In addition, the Attorney General reports that his office at times provides information to local officials, such as sheriffs and county commissioners, with regard to recent decisions which may affect them, but that the state's Department of Corrections has only considered some sort of ''small claims'' procedure for its inmates to help cut down the number of section 1983 lawsuits.

Wisconsin

Wisconsin has not adopted enterprise liability, and continues to enjoy sovereign immunity, *Fiala v. Voight*, 93 Wis. 2d 337, 286 N.W.2d 824 (1980), which is provided for in its constitution, and which the courts have ruled is procedural in nature and a matter of personal jurisdiction. Officers or employees of the state, however, are personally liable for actions taken in the course of their employment. *Cords v. Ehly*, 62 Wis. 2d 31, 214 N.W.2d 432 (1974); *Chart v. Dvorak*, 57 Wis. 2d 92, 203 N.W.2d 673 (1973). That liability is, however, limited to breach of duties which are ministerial, as opposed to discretionary, with a ministerial duty being described as one which is absolute and imperative, leaving nothing to judgment or discretion. *Cords v. Anderson*, 80 Wis. 2d 525, 259 N.W.2d 672 (1977); *Pavlik v. Kinsey*, 81 Wis. 2d 42, 259 N.W.2d 709 (1977); *Lister v. Board of Regents*, 72 Wis. 2d 282, 240 N.W.2d 610 (1976). An action against an officer in his official capacity, under circumstances where liability is sought to be imposed on the office, rather than the person, gives rise to sovereign immunity. *Appel v. Halverson*, 50 Wis. 2d 230, 184 N.W.2d 99 (1971).

Against that background, the Attorney General reports that Wisconsin has sought to insure itself. Pursuant to section 895.46, Wis. Stat., the state assumes responsibility for the payment of judgments arising out of acts taken within the scope of employment, and for the payment of the costs of defense under the same circumstances, with the provision that the state has the option of providing counsel. Under section 165.25(6), Wis. Stat., the Attorney General is authorized to defend such actions, and is given the authority to compromise. Under section 893.82, Wis. Stat., notice to the office of the Attorney General is required and a limit is placed on the amount of recovery. The employee is not left bare for the excess, however, since the obligation to pay the judgment is contained in section 895.46, Wis. Stat., and is unlimited, section 893.82, Wis. Stat., because that statute does not place a limit on the state's obligation to pay, but on the amount of recovery so that in the case of multiple plaintiffs or defendants, the exposure is higher than the stated limit. The system covers everything, including medical malpractice at university hospitals, automobile liability for the entire state fleet as well as officers and employees driving personal vehicles on business and the traditional governmental liability.

The Attorney General identified three sources of official liability: civil rights actions brought pursuant to 42 U.S.C. § 1983, ordinary negligence actions brought pursuant to state law, and intentional tort actions brought pursuant to state law including such things as assault (excessive force in arrest cases, for example) and defamation. Neither the notice requirements or dollar limits of section 893.82 apply to section 1983 actions.

The Wisconsin system has been in operation, with minor modifications, since about the middle of 1974, and according to the Attorney General, has served the state well. Loss experience is substantially lower than would reasonably be expected.

Wyoming

Wyoming has not adopted enterprise liability, although in 1979, Wyoming enacted the Governmental Claims Act, Wyo. Stat. § 1-39-101 *et seq*. The Act provides for sovereign immunity for all employees' actions within their authority except for certain enumerated torts, which include liability arising out of the operation of motor vehicles, aircraft and watercraft; maintenance of public buildings or parks; operation of airports; operation of public utilities; operation of health care facilities; negligence of health care providers; maintenance or operation of a public facility; and all tortious conduct of law enforcement officers. The maximum liability is $500,000.00, and the governmental entity is obliged to indemnify its employees to that extent.

The Attorney General reports that most section 1983 claims in Wyoming arise out of tortious conduct of law enforcement officers. In such cases, the governmental entity employer indemnifies. When a non-law enforcement employee is sued under section 1983, Wyoming law provides a defense on behalf of the employee individually and, if the act complained of is within the scope of employment, indemnification would probably be available.

Section 104(a) of the Act provides the immunity described above, and Section 104(b) provides that a "governmental entity shall save harmless, and indemnify its public employees against any tort claim or judgment arising out of an act or omission occurring within the scope of their duties." One school construes this language as limited to those torts for which immunity is waived within the Act. The other believes that this language applies to "constitutional torts" under section 1983 for which liability exists independently of the Act. The question has not yet been judicially determined. The Attorney General reports that Wyoming has no training programs to reduce the risk of liability for official or employee misconduct.

C. The Congressional Response to Section 1983 Liability: Legislative Developments

As seen above, most states have enacted some form of legislation designed to provide a system of protections for state—and sometimes local—officials and employees from the threat of liability under 42 U.S.C. § 1983. Although a few state attorney generals who responded to the survey indicated that section 1983 had not been a major problem for the state, the most widely shared view of the state attorney generals was the suggestion that legislation be enacted to amend sections 1983 and 1988 so as to negate the impact of *Thiboutot*, *Owen* and other recent cases.

During the 97th Congress, the Senate Committee on the Judiciary considered such amendments to sections 1983 and 1988. Hearings were held on S. 584 and S. 585, sponsored by Senator Orrin Hatch (R-Utah).[114]

S. 584, if enacted, would effectively overrule the decision in *Thiboutot* by deleting from section 1983 the phrase "and laws." Thus, claimants who feel they have been deprived of rights or benefits conferred under a federal assistance program would no longer be able to resort to section 1983 to remedy such deprivations on the basis of the "and laws" aspect of that provision.

S. 585, as reported by the Subcommittee on the Constitution on May 4, 1982, would restore the good-faith defense to local governments in damage actions brought under section 1983, thereby partially overruling the holding in *Owen*. However, unless S. 584 were also enacted into law, the enactment of S. 585 alone would not assure a noticeable decrease in the number of suits filed against local governments, since section 1983 would still be available for injunctive or other equitable relief.

As noted at the outset of this Chapter, consideration of section 1983 has been limited to the problem of "derivative" liability under federal assistance programs. Consequently, no attempt was made to explore the complex problems that section 1983 may cause for state or local officials in other contexts. While the testimony presented to the Senate Committee on the Judiciary vividly demonstrated the problems created for state and local governments and officials as a result of recent developments under section 1983, any legislation to amend that provision is likely to continue to generate controversy and face strong opposition from influential members of Congress and groups concerned with the protection of civil liberties. Given the controversy engendered by any discussion to amend section 1983, and because no parallel action to amend section 1983 has been undertaken in the House, the prospects for passage of such a measure in the near future is remote. In any event, amending section 1983—which even prior to *Thiboutot* served to vindicate a plethora of individual rights against governmental abuse—appears to be the least desirable, if not least feasible, way to ameliorate the threatening prospect of "derivative" liability.

D. A New Legislative Option

The case law analyzed above clearly points to the conclusion that federal assistance programs are an area ripe for litigation under section 1983. Moreover, increased litigation under section 1983 involving federal assistance programs is likely to have a serious and negative impact on the effective operation of such programs by state and local officials, even though these officials will be insulated from personal liability in situations where good-faith immunity is available.

---

[114] The Committee held four (4) days of hearings in 1981 at which representatives of several public interest groups such as the National Association of Attorney Generals, the National League of Cities, the National Institute of Municipal Law Officers and the National Conference of State Legislatures and the National Association of Counties testified in support of S. 584 and S. 585. *See generally Section 1983 Hearings, supra* note 28, at 593 (statement of Heinz Hink, representing the National League of Cities). Several individuals and representatives of other organizations—such as the American Civil Liberties Union—expressed deep concern about any legislation to amend either sections 1983 or 1988. *Id.* at 44 (statement of Steven Steinglass, representing the National Legal Aid and Defender Association).

However, fundamental changes in sections 1983 and 1988 appear to be the least appropriate way to address the problem of increased litigation under section 1983 arising from federal assistance programs. Instead, following the Supreme Court's decision in *Patsy*, Congress should conduct hearings in order to consider legislation that would require the exhaustion of state administrative remedies prior to bringing suit under section 1983 for an alleged violation of the terms or conditions of a federal assistance program by any state or local official or political subdivision of a state.[115] The legislation should be applicable to all types of federal assistance programs. And importantly, exhaustion should not be required for actions brought under section 1983 which allege a colorable constitutional violation.

Such legislation could be drafted with the following goals in mind: preservation of existing remedies for the vindication of federal constitutional rights; providing aggrieved individuals or groups with an adequate, orderly, less costly and less time-consuming process for hearing their complaints; encouraging state and local grantees to maximize managerial efficiency of programs funded by federal assistance; ameliorating the adverse impact that increased section 1983 litigation could have on the successful assumption of responsibility by state and local entities for the administration and management of federal assistance programs; and reduction in the burdens that would otherwise be imposed on the federal judiciary if each time a complaint arises out of state or local administration of a federal assistance program, judicial action is required to settle that dispute.

Legislation to establsih an exhaustion requirement would have the following key features:

(1) Exhaustion

A claimant would be required, prior to bringing an action under section 1983, to exhaust state administrative remedies which have been determined to be in substantial compliance with minimum acceptable standards promulgated by the federal agency having primary responsibility for the assistance program which forms the basis for the complaint or grievance.

(2) Exceptions to Exhaustion

Either the legislation, the regulations, or both, would set forth the following exceptions or qualifications with respect to the requirement of exhaustion:

- Claims based purely on alleged federal constitutional violations would not be subject to exhaustion in any case.

---

[115] The administrative remedies provided to potentially aggrieved claimants and intended beneficiaries under the Rehabilitation Act of 1973, 29 U.S.C. § 722(d) and the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1415, as well as the regulations and the case law relating thereto, should also be consulted in developing the framework for legislation along these lines.

- A federal court would be authorized to grant interim relief in appropriate cases.
- A federal court would be authorized to waive the exhaustion requirement in any case in which the court determines that exhaustion would be futile or the administrative remedy would be clearly inadequate.

(3) Minimum Standards

A state or local government would not be required, as a condition to receiving federal assistance, to establish administrative procedures that comport with the federal minimum standards. State provision of such procedures would be voluntary. A state, for example, could provide whatever procedure it deems appropriate and might even choose not to provide any procedures at all. Importantly, however, the exhaustion requirement would only be applicable in those cases where state administrative procedures have been determined to meet the minimum federal standards.

Thus, there would be a built-in incentive—temporary relief from section 1983 actions—for states to develop procedures for dealing with problems which may arise out of state and local administration of federal assistance programs. In deciding whether to provide such remedies, states which serve fewer beneficiaries would likely weigh the benefits that would be gained by having to defend fewer section 1983 claims against the costs that would be incurred under an administrative grievance process. Those states which serve a greater number of beneficiaries—and thus face a greater potential or risk of being sued under section 1983—would be free to develop whatever procedures best meet their particular concerns or problems.

The minimum standards could be designed to address the types of claims or disputes likely to arise under a federal assistance program. Thus, the legislation should contain a requirement—similar to that found under 42 U.S.C. § 1997(e)—that the federal grantor agency consult with and solicit the views of state and local agencies and persons and organizations in its effort to develop adequate and appropriate minimum standards.

While the legislation should not attempt to establish the minimum standards that would apply in any particular case—a task to be performed by the appropriate grantor agency in consultation with identified persons and groups—the legislation could, in addition to the consultation requirement, contain the following general provisions:

- Specific maximum time limits for replying to grievance or claim filed by a party.
- Specific maximum time limits in which the relief requested would either have to be granted or denied.
- Priority processing of claims of an emergency nature, including those in which delay would endanger or create substantial risk of injury or damage to a person or group of persons.
- Safeguards to ensure independent decision making within the state administrative process.

- De novo review in every case of state administrative determinations as to questions of fact and law.
- Procedures for periodic review of the continued adequacy of state administrative procedures, as well as complaints about the integrity or fairness of a state's procedures.

It is recognized that the details of the proposed legislation raise many questions. Thus, the recommendation for congressional hearings is only a first step. As noted by the Supreme Court in *Patsy*—several important questions would be (1) how to define the types of federal assistance claims for which exhaustion would be required; (2) what tolling requirements and time limitations should be imposed; (3) what would be the *res judicata* and collateral estoppel effect of particular administrative determinations; and (4) how to deal with claims of a dual nature—i.e., those based on alleged violations of constitutional standards, as well as claims based on federal statutory rights.

E. Recommendation

The Supreme Court's expansion of the scope of 42 U.S.C. § 1983 to include claims based on alleged violations of federal statutory laws gives rise to the spectre of an increase in the number of section 1983 actions against state and local officials and municipalities involved with federal assistance programs. The continued devolution of responsibility for managing federal programs to the state and local levels is likely to add to the rise in these types of section 1983 claims still further.

Although most states have some system to insulate government officials from personal liability under section 1983, increased litigation under that section is sure to have an adverse impact on state and local administration of federal assistance programs. To date, efforts to address the problem of expanded section 1983 liability have focused exclusively on amending section 1983 by deleting the phrase "and laws," thereby negating the effect of the Supreme Court's decision in *Maine v. Thiboutot.*

However, in light of the importance of section 1983 in the vindication of personal rights, amending that section is the least viable alternative for ameliorating the somewhat more discrete problem of derivative liability and increased litigation involving federal assistance programs. Instead, following the Supreme Court's decison in *Patsy v. Board of Regents of Florida* and the suggestions made by several of the Justices in that case, this recommendation calls upon Congress to consider legislation that would require the exhaustion of state administrative remedies as a prerequisite to bringing an action under 42 U.S.C. § 1983 for an alleged violation of the terms, conditions or rights created by a federal assistance program by any state or local official or political subdivision of a state.

RECOMMENDATION

The purpose of this recommendation is to avoid an increase in the number of claims likely to be filed under 42 U.S.C. § 1983 against state and local officials and municipalities involved in the administration of federal assistance programs, and to provide an alternative system for the resolution of such claims. In addition, this recommendation seeks to preserve existing remedies for the vindication of federal constitutional rights; provide an adequate, less costly and less time-consuming process for resolving disputes that arise out of federal assistance programs; encourage state and local governments to maximize managerial efficiency of programs and projects funded by federal assistance; ameliorate the adverse impact that section 1983 litigation would have on the successful operation of federal assistance programs by state and local entities and officials; and reduce the level of intervention by the federal judiciary in the administration of federal assistance programs. The recommendation set forth below should thus be applicable to all federal assistance programs benefiting state and local entities and third parties. Legislation to require exhaustion of state administrative remedies should contain the following general provisions:

(1) A third party or intended beneficiary of a federal assistance program would be required, prior to bringing an action under section 1983, to exhaust state administrative remedies which have been determined to be in substantial compliance with minimum standards promulgated by the federal agency having primary responsibility for the assistance program that forms the basis for the third party complaint or grievance.

State receipt of federal assistance would not be conditioned upon that state's agreeing to establish administrative remedies in compliance with minimum federal standards. Instead, state provision of adequate administrative remedies would be voluntary. However, the exhaustion requirement would only be applicable in those states where such remedies have been implemented.

(2) Claims based purely on alleged federal constitutional violations would not be subject to exhaustion in any case. In addition, a federal court would be authorized to grant interim relief in appropriate cases in accordance with federal rules of civil procedure, and would also be authorized to waive the exhaustion requirement in any case in which the court determines that exhaustion would be futile or the administrative remedy would be clearly inadequate.

(3) A federal agency having primary responsibility for the administration of federal assistance programs would promulgate—in consultation with state and local entities and interested persons and groups—minimum standards to guide states in establishing administrative procedures and remedies for third party complaints relating to such programs. Such standards would be patterned after the following general statutory requirements: specific maximum time limits for replying to a grievance or claim filed by a party; specific maximum time limits in which the relief requested would either have to be granted or denied; priority processing of claims of an emergency nature, including those in which delay would endanger or create substantial risk of injury or damage to a person or group of persons; safeguards to ensure independent decision making within the state administrative process; de novo review in every case of state administrative determinations as to questions of fact and law; and procedures for periodic review of the continued adequacy of state administrative procedures, as well as complaints about the integrity or fairness of a state's procedures.

APPENDIX C

ANNOTATED SURVEY OF LITERATURE

I. Congressmen and State Legislators
II. Federal Officials
III. General
IV. Judicial Immunity
V. Municipalities
VI. Presidential Immunity
VII. State & Municipal Immunity Under the Civil Rights Act
VIII. State Sovereign and Governmental Immunity

This collection of annotations is a selective survey of the commentaries concerning official liability for the period 1961 to 1982. The annotations are divided into eight general topics and are presented in reverse chronological order.

CONGRESSMEN AND STATE LEGISLATORS

Comment, Speech or Debate Clause Immunity for Congressional Hiring Practices: Its Necessity and Its Implications, 28 U.C.L.A. L. Rev. 217 (1980).

A comment centering on Davis v. Passman, 442 U.S. 228 (1979), beginning with an examination of the historical roots of the speech or debate clause. The author analyzes various Supreme Court rulings in order to delineate the scope of the privilege afforded by the Court. Finally, this comment takes a critical look at the Court's approach to the immunity's scope, and suggests a more equitable means of determining when the privilege should attach.

Comment, The Speech or Debate Clause in the Criminal Context, 15 New Eng. L. Rev. 407 (1980).

This comment analyzes the conflict between bribery prosecutions and the speech or debate clause and considers the role of the Supreme Court's decision in United States v. Helstoski, 442 U.S. 477 (1979) in seeking a resolution to the conflict. This is done by an examination of the decision; a look at the historical evolution of the speech or debate clause; and, an assessment of whether the Helstoski holding goes too far or not far enough toward preserving the role played by the speech or debate clause in the constitutional framework of separate but equal branches of government.

Hutchinson v. Proxmire: The Vanishing Immunity Under Speech or Debate Clause, 14 J. Mar. L. Rev. 263 (1980).

The author traces the evolution of the speech or debate clause from British common law through its application in Hutchinson v. Proxmire, 443 U.S. 111 (1979). The conclusion is reached that a narrow interpretation of the clause is appropriate in this case because the facts dealt with informing the public of the wasteful expenditure of tax money, a subject at the very heart of the legislative process.

Note, Legislative Immunity and Congressional Necessity, 68 Geo. L.J. 783 (1980).

Discussion of Hutchinson v. Proxmire in light of the historical development of the speech or debate clause and prior Supreme Court decisions. The author criticizes the Supreme Court's movement toward limiting the scope of immunity granted legislators and concludes that the decision in Hutchinson erodes the doctrine of legislative immunity which could lead to an undermining of the ability of Congress to legislate.

Note, Speech or Debate Clause and the Search for the Golden Fleece, 9 Cap. U.L. Rev. 729 (1980).

This note attempts to determine the present status of the speech or debate clause through an analysis of Hutchinson v. Proxmire and other recent Supreme Court decisions. Further, it suggests alternative theories or factors which the Court could have used in reaching its decision in Proxmire.

Proxmire and the Golden Fleece: A Case Against Blanket Immunity Under the Speech or Debate Clause, 26 Loy. L. Rev. 159 (1980).

This article discusses the Supreme Court decision in Hutchinson v. Proxmire that congressional press releases and newsletters are not protected by the speech or debate clause. The author briefly discusses prior federal cases interpreting the clause and then examines the theoretical foundations of the Supreme Court's decision in Proxmire. The author examines Justice Brennan's dissent, and argues that it is unlikely that it will have sufficient force to give new life to the absolute immunity contained in the speech or debate clause.

Bolton, Vanderstar & Baldwin, The Legislator's Shield: Speech or Debate Clause Protection Against State Interrogation, 62 Marq. L. Rev. 351 (1979).

The authors of this article were co-counsel for former Congressman William A. Steiger who, at the time of his death, was litigating in the Wisconsin Supreme Court the question whether under the speech or debate clause a state prosecutor can compel a congressman to reveal the names of citizens who supplied, in confidence, information about legislative matters. The purposes and history of the clause are traced back to English laws, and Supreme Court decisions concerning the clause are discussed. The authors present arguments on why Rep. Steiger's conversations were protected and warn that if Congress and its members are to be denied access to useful information due to citizen reluctance to come forward without confidentiality, the institutional integrity of the legislative branch will be irreparably impaired.

Bradley, The Speech or Debate Clause: Bastion of Congressional Independence or Haven for Corruption, 57 N.C.L. Rev. 197 (1979).

The author examines the historical background of the speech or debate clause to determine whether the scope given the privilege by the courts has been appropriate. In opposition to those who have argued that the courts have interpreted the clause too narrowly, Bradley feels that the courts have taken too broad a view of the clause. Thus, a serious impediment to successful investigation and prosecution of congressional corruption has been created.

Comment, Sixth Circuit Court Recognizes Common Law Speech or Debate Privilege for State Legislators in Excluding Evidence of Bribery Solicited by State Senator, 13 Suffolk U.L. Rev. 1538 (1979).

A discussion of the sixth circuit's rationale for recognizing a speech or debate privilege in a bribery prosecution, United States v. Gillock, 587 F.2d 284 (6th Cir. 1978). The author criticizes the ruling and suggests that the court should have granted official immunity which would ensure legislative independence but permit a legislator to be prosecuted.

Comment, The Supreme Court Interprets the Speech and Debate Clause, 48 U. Cin. L. Rev. 1015 (1979).

The author of this comment analyzes several recent Supreme Court decisions interpreting the speech and debate clause and criticizes the Court's limiting the clause to formal proceedings by attempting to distinguish between legislative activity and political activity. The author argues that this test fails to recognize congressional functions which may not fall within protected "legislative activities" such as informing the public of legislative affairs and overseeing the executive and judiciary branches. The author calls upon the Court to constitutionally recognize these two important congressional functions.

Note, A Common-Law Privilege for State Legislators in Federal Criminal Prosecutions, 54 St. John's L. Rev. 79 (1979).

This note explores the problems involved in adopting a common-law speech or debate privilege for state legislators. It examines the many conflicting arguments advanced in circuit court cases that have considered this question. The writer demonstrates that neither the constitutional privilege as construed by the Supreme Court nor its historical roots, prohibit state legislators from receiving protection in federal actions.

Note, Evidentiary Implications of the Speech or Debate Clause, 88 Yale L.J. 1280 (1979).

Through a discussion of United States v. Helstoski, 576 F.2d 511 (3d Cir. 1978), this note interprets the evidentiary privilege based on the distinction between protected legislative acts and unprotected non-legislative acts under the speech or debate clause. The author argues that reliance on this distinction would render bribery prosecutions of congressmen feasible while protecting the legislative process from improper interference.

Note, Judicially Created Criminal Immunity for State Legislators, 10 U. Tol. L. Rev. 1037 (1979).

To provide a basis for analysis of United States v. Gillock, this note examines the legislative history of Federal Rule of Evidence 501 and the historical development of the speech or debate privilege. The focal point of this note is the court's creation of an immunity privilege in federal criminal actions in the absence of a common-law precedent, a severe departure from the position adopted in other circuits.

Note, Looking for Privileges and Immunities, 41 U. Pitt. L. Rev. 89 (1979).

This note examines past Supreme Court interpretations of the privileges and immunities clause and the tests used by the Court to answer privilege and immunity questions. Two recent decisions, Baldwin v. Fish and Game Comm'n of Montana, 436 U.S. 371 (1978), and Hicklin v. Orbeck, 437 U.S. 518 (1978), which used different tests in determining whether state laws were unconstitutional, are examined. The author argues that use of the Hicklin test, a general balancing of the federal interest in equal treatment against the state's needed leeway in protecting its own interests with weight given to the state justification factor, will result in increased litigation which will delineate the contours of the clause.

Note, The Case for a Speech or Debate Privilege for State Legislators In Federal Courts, 13 Val. U.L. Rev. 501 (1979).

This note first examines the common-law origins of the speech or debate clause in the English Parliament as a protective measure for members against criminal liability and interference by the Crown. Next, the scope of this privilege is viewed through Supreme Court decisions. This note discusses the Court's interpretation in Tenney v. Brandhove, 341 U.S. 367 (1951). Finally, an alternative solution to the question of a common-law speech or debate privilege for state legislators is proposed.

Note, Davis v. Passman: Will Bivens Survive?, 41 U. Pitt. L. Rev. 131 (1979).

This note, written before the Supreme Court handed down its decision in Davis v. Passman, argues that the Supreme Court should reverse the fifth circuit's decision refusing to extend the scope of Bivens to imply a cause of action for damages from the due process clause of the fifth amendment. The author argues that Bivens-type remedies are an important link in the protection of individual liberties. The Bivens doctrine should remain broad and should insure that where rights protected by the Constitution are violated, there will be a remedy when there is no adequate statutory substitute.

Comment, The Constitutional Limits of the Speech or Debate Clause, 25 UCLA L. Rev. 796 (1978).

This comment attempts to find a solution to the problem of mutually exclusive constitutional rights and privileges being asserted in cases involving speech or debate immunity. After tracing the English and American roots of the clause, the author examines the Supreme Court's treatment of the clause. According to the author, the most desirable solution would be enactment of a statute that provides for a limited waiver of the privilege of immunity in constitutional actions. The government would provide counsel, and would pay any damages out of a special fund established for such purpose. Suits by private litigants would be the only ones permitted under this scheme.

Comment, Protection of State Legislative Activity From Federal Prosecution: Common-Law and Constitutional Immunity, 58 B.U.L. Rev. 469 (1978).

The author attempts to determine whether any federal criminal immunity, either of common-law or constitutional origin, safeguards the performance of state legislative duties. Court decisions from the First, Third and Seventh Circuit Courts of Appeals holding that evidentiary privilege did not bar discovery of legislative activities in criminal prosecutions are examined. The development of the concept of legislative immunity is discussed and the circuit courts' reasoning in each of the decisions is reviewed and criticized. The author argues that courts should recognize a common-law immunity for state legislators charged with federal crimes, as well as a constitutional immunity for acts within their legislative function.

Comment, McSurely v. McClellan: Civil Suits Under the Speech or Debate Clause, 71 Nw. U.L. Rev. 783 (1977).

After analyzing application of the speech or debate clause as a defense to a civil suit stemming from a congressional investigation, the author concludes that absolute immunity should attach only when the investigation has a proper legislative purpose. The defendants also must neither disseminate actionable material outside Congress nor commit an unlawful act against the plaintiffs. The use of this test will aid in defining the line between guarding against abuses of power and ensuring unintimidated representation by members of Congress.

Comment, *Neither Federal Speech or Debate Clause Nor Official Immunity Doctrine Bars Admission of State Legislators' Statements in Federal Criminal Proceedings*, 8 Rut.-Cam. L. Rev. 550 (1977).

> This comment criticizes the seventh circuit's refusal to afford a testimonial privilege barring inquiry into the official activities of a state legislator in a federal criminal prosecution, as a misapplication of the doctrine of official immunity (*United States v. Craig*, 537 F.2d 957 (7th Cir. 1976)).

Equal Access and the First Amendment: The Debate Behind "Speech or Debate", 4 Hastings Const. L.Q. 35 (1977).

> A critique of the D.C. Circuit's holding in *Consumers Union of the U.S. v. Periodical Correspondent's Assoc.*, 515 F.2d 1341 (D.C. Cir. 1975) in which the writer suggests that the court erred in its decision. She explains that this case could lead to a catalogue of potential constitutional horrors.

Greenberg, *A Member of Congress is Liable for Damages Arising From His Sex-Based Dismissal of a Staff Member, But May Assert a Qualified Immunity Defense*, 46 Geo. Wash. L. Rev. 137 (1977).

> A discussion of *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977) in which the court concluded that a congressman's dismissal of an employee on the basis of sex is a basis for an action for damages under the Constitution. The court also held that such a dismissal is outside the scope of legitimate legislative activity as defined by the Supreme Court.

Note, *A Speech or Debate Privilege for State Legislators Who Violate Federal Criminal Laws?*, 68 J. Crim. L. 31 (1977).

> The authors of this note examine a seventh circuit decision *United States v. Craig* that state legislators do not have a federal common-law speech or debate immunity privilege when being prosecuted for a federal crime. The authors trace the development of the speech or debate privilege and discuss a number of court decisions establishing its scope. After comparing the constitutional privilege with the doctrine of official immunity, the authors argue that the doctrine of official immunity for legislators is still a viable alternative for determining the scope of a legislator's privilege in those situations where a constitutional privilege is unavailable.

Cases, The Speech or Debate Privilege Enjoyed by State Legislators in Federal Criminal Prosecutions Arises Under Federal Common Law, 45 U. Cin. L. Rev. 325 (1976).

The author examines the seventh circuit's decision in United States v. Craig, 528 F.2d 773 (7th Cir. 1976) that the speech or debate privilege enjoyed by state legislators in federal prosecutions arises under federal common law and may be waived. The rationale and history of the speech or debate privilege are examined, as are Supreme Court decisions applying the doctrine to state legislators. The author believes that the application of an absolute common-law speech or debate privilege in the Craig context is inappropriate. Rather, evidence of state legislative activity should be considered privileged until the prosecution has established probable cause on the basis of other evidence.

Comment, Legislative Immunity: Congressional Investigators Immune From Charges of Invasion of Privacy, 28 U. Fla. L. Rev. 843 (1976).

The author discusses the holding in McSurely v. McClellan, 521 F.2d 1024 (D.C. Cir. 1975) that the speech or debate clause provides immunity for a congressional investigator's inspection, copying and transportation of material seized by a county prosecutor in violation of the fourth amendment, so long as the congressional aide did not participate directly in the fourth amendment violation. The development of the tests applied by the fourth circuit are discussed. The author criticizes the court's decision in McSurely and states that perhaps its most far-reaching impact is its apparent approval of potentially abusive investigatory powers for an agency that is not required to defend its actions in a court.

Speech or Debate Clause as a Defense in Private Civil Suits, 10 Ga. L. Rev. 953 (1976).

The recent use of the speech or debate clause as an obstruction to private civil suits does not seem warranted by the history of purpose of the clause. The author proposes a test -- based by analogy upon decisions in contempt proceedings initiated by Congress -- to balance constitutional interests at stake so that those acts by legislators that violate the constitutional rights of private citizens are not privileged.

Zweig, *Congressional Agent's Seizure and Subcommittee's Review of Documents Known to be Irrelevant to Purpose of Investigation Are Still Within Immunity of Speech or Debate Clause Because Investigation is Facially Legislative and Because of Lawful Means Used to Obtain Documents*, 65 Geo. L.J. 167 (1976).

> Criticizes the decision in *McSurely v. McClellan* which excluded fourth amendment violations from protection under the speech or debate clause. The author argues that the court unjustifiably broadened the scope of the clause by holding that seizure of irrelevant material was immune from suit. The court is accused of sacrificing an individual's rights to ensure the goals of speech or debate for nonlegislative reasons.

Charney & Selvers, *Executive Encroachment on Congressional Immunity*, 50 St. John's L. Rev. 38 (1975).

> This article discusses the opinion of the Court of Appeals for the District of Columbia Circuit in *Hartke v. Federal Aviation Administration*, 369 F. Supp. 741 (1973). In order to fully understand the implications of this decision, the author provides a brief examination of the origin and status of airport searches and the historical path which the congressional immunity doctrine has traversed.

Cella, *The Doctrine of Legislative Privilege of Speech or Debate: The New Interpretation as a Threat to Legislative Coequality*, 8 Suffolk U.L. Rev. 1019 (1974).

> This article deals with developments in the area of the legislative privilege of speech or debate, and primarily concern its interpretation by the Supreme Court in *United States v. Brewster*, 408 U.S. 501 (1972), *Gravel v. United States*, 408 U.S. 606 (1972), and *Doe v. McMillan*, 412 U.S. 306 (1973). In the author's view, these cases present a direct threat to the continued functioning of the Congress as a coequal branch of government.

Comment, *Congressional Perequisites and Fair Elections: The Case of the Franking Privilege*, 83 Yale L.J. 1055 (1974).

> An examination of the different ways in which the courts and Congress have attempted to reconcile the conflicting needs for fair elections and subsidizing communication between the representative and constituent. Outlines the judicial attempts from 1968 to 1972 to resolve the problem by statutory interpretation; analyzes the solution offered by Congress in 1973; considers four traditional proposals and offers a proposal to allow the political market to balance competition with communication.

Kutner, Due Process of Debate: A Senator's Dilemma, 26 Baylor L. Rev. 287 (1974).

The author discussed the issues and implications of the case Gravel v. United States in which the Supreme Court held that certain arrangements established by Senator Gravel to publish the Pentagon Papers were not protected by the speech or debate clause. The positions and arguments of the individual Justices are examined in depth. The history of the clause is traced from its English roots, and American judicial precedents interpreting the clause are reviewed. The author concludes by discussing the arguments presented in the briefs filed in the case.

Note, Unenforced Congressional Subpoenas: Judicial Action and Congressional Immunity, 59 Iowa L. Rev. 581 (1974).

Consideration of two interrelated problems presented in United States Servicemen's Fund v. Eastland, 488 F.2d 1252 (1973); the first is a discussion on whether the federal judiciary should expand protection to cover individuals whose first amendment rights are threatened by an unenforced congressional committee subpoena and who are without any alternative means for protection of those rights. Second, if the courts do so expand their protection, the question of whether congressional immunity under the speech or debate clause may bar judicial action.

Suarez, Congressional Immunty: A Criticism of Existing Distinctions and a Proposal for a New Definitional Approach, 20 Vill. L. Rev. 97 (1974).

A study of eight Supreme Court decisions involving interpretation of the speech or debate clause. The author attempts to extract a definitional approach to congressional immunity from each one. These approaches, as well as others, are criticized and an evaluation is made of their constitutional validity.

Comment, Immunity Under the Speech or Debate Clause for Republication and From Questioning About Sources, 71 Mich. L. Rev. 1251 (1973).

A discussion of Gravel v. United States which criticizes the Supreme Court's failure to define the proper role of the judiciary in adjudicating conflicts between different branches of the government and the place the speech or debate clause must necessarily have in defining this role. The author argues that the Court's imprecision was more than a missed opportunity to clarify the underlying rationale of the limitations on immunity, for it led the Court to restrict the scope of immunity unwisely with regard to Gravel's activities at a subcommittee meeting and to his aide.

Comment, Speech or Debate Clause -- Alleged Criminal Conduct of Congressmen Not Within the Scope of Legislative Immunity, 26 Vand. L. Rev. 327 (1973).

The author argues is that if the privilege of legislative immunity is to perform its traditional function of allowing legislators to carry out their duties without fear of prosecution, it should be applied broadly to effectuate its intended purpose of preserving the independence of the legislature. It should be left up to Congress to reprimand or expel any member found guilty of criminal transgressions.

Ervin, The Gravel and Brewster Cases: An Assault on Congressional Independence, 59 Va. L. Rev. 175 (1973).

The author asserts that the Supreme Court's decisions in Gravel v. United States and United States v. Brewster have restricted congressional immunity to the point where members of Congress can no longer acquire information on the activities of the executive branch nor report such information to their constituents without risking criminal prosecution. He concludes that these decisions pose a clear and present threat to the continued independence of Congress as a coordinate branch of government and constitute a further deterioration of its power and prerogatives in relation to the executive and judicial branches.

Note, Scope of Legislative Immunity Restrictively Extended to Aides, 4 Seton Hall L. Rev. 277 (1973).

A thorough examination of Gravel v. United States, which presents an analysis of the development of the speech or debate clause. The author submits that this ruling could allow one branch of government to enlist the aid of a second in subduing the proper operation of the third.

Note, Speech or Debate Clause, 22 De Paul L. Rev. 713 (1973).

A discussion of the Supreme Court's holding in Gravel v. United States. The author explores the nature of the legislative process and attempts to determine which of its aspects are entitled to the protection of the speech or debate clause.

Note, The Speech or Debate Clause and Immunity for Congressional Aides, 11 Duq. L. Rev. 677 (1973).

A discussion of the immunity doctrine as applied by the Supreme Court in Gravel v. United States. The primary focus is on Justice Stewart's suggestion that recognition of the immunity doctrine by the courts should be on a case-by-case basis in order to develop a proper scope of immunity which would prove to be adequate over the long-run.

Runstein & Silvergate, Legislative Privilege and the Separation of Powers, 86 Harv. L. Rev. 1,113 (1973).

The authors argue that the scope of the speech or debate clause must be defined historically. They trace the evolution of the privilege as a means of preserving legislative independence and conclude that the clause's current scope must encompass all legitimate functions of a legislature. This requires that the privilege be interpreted broadly to prevent executive intrusions. The authors also contend that a narrow viewpoint should be considered in private civil suits brought against congressmen or congressional committees, especially suits involving constitutional rights. Finally, because certain Supreme Court decisions have not afforded adequate protection, the authors outline several legislative options through which Congress could preserve its independence.

Comment, Speech or Debate Clause Held No Bar to Declaratory Judgment and Injunction Against Publication of Congressional Committee Report by Public Printer, 16 N.Y.L.F. 934 (1970).

The author discusses the declaratory judgment in Hentoff v. Ichord, 318 F. Supp. 1175 (D.D.C. 1970) and the issuance of a permanent injunction barring publication or distribution of a congressional committee report by the Public Printer and Superintendant of Documents. An action against the individual committee members was dismissed because of their immunity. The author supports the decision but notes an apparent inconsistency in affording absolute immunity to the defendants as individuals, while finding the report to have no relationship to proper legislative purpose. Because a revised report was subsequently issued by the Committee, supported by a House Resolution prohibiting obstruction by the courts, the author feels that the doctrine of legislative immunity prevented a test of the constitutionality of legislative activity in this case.

Note, Declaratory and Injunctive Relief Against a Congressional Committee, 1970 Wis. L. Rev. 1216.

A note discussing the appropriateness of declaratory and injunctive relief against a congressional committee and the effect of the speech or debate clause in the congressional immunity defense. Concludes that although used sparingly, declaratory and injunctive relief should be allowed to protect individual rights.

Cella, The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts, 2 Suffolk U.L. Rev. 1 (1968).

In this article, the historical origins and development of the doctrine of legislative privilege, together with its underlying and emergent public policy considerations are discussed at length. Prior American judicial decisions making specific applications of this doctrine are discussed, as are the rationale and implications of Coffin v. Coffin, 4 Mass. 1 (1808).

Note, Speech or Debate Clause Held Bar to Injunction Against Contempt of Congress Proceeding, 43 N.Y.U. L. Rev. 1227 (1968).

A discussion of Stamler v. Willis, 287 F. Supp. 734 (N.D. Ill. 1968) which reaches the conclusion that courts should not hinder congressional investigations, despite claims of illegitimacy. However, when Congress seeks to test its investigatory power in the courts, the courts may properly inquire into whether the committee investigation is a legitimate exercise of legislative activity. Also concludes that injunctive or declaratory relief is inappropriate if the investigation was based on constitutional authority.

Comment, Scope of Immunity for Legislators and Their Employees, 77 Yale L.J. 366 (1967).

Traditionally, the scope of the speech or debate clause has been broadly interpreted to include much more than verbal expressions on the floor of Congress. However, its limits have never been entirely clear. This article discusses cases which suggest that the Supreme Court is beginning to narrow the reach of the clause.

Charles, "They Shall Not Be Questioned in Any Other Place": A New Look at Legislative Immunity, 3 L. in Trans. Q. 45 (1966).

This article focuses on a number of court decisions involving legislative investigations which strongly suggest that committees within the California state legislature may not have legislative immunity from actions brought on the basis of libel.

Comment, The Bribed Congressmen's Immunity from Prosecution, 75 Yale L.J. 335 (1965).

This comment criticizes the five arguments advanced by the fourth circuit in United States v. Johnson, 337 F.2d 180 (4th Cir. 1964). The author feels that the court's rationale in construing the free speech or debate clause is unsupportable as a comprehensive prohibition of any congressional attempt to subject its members to prosecution for bribery.

Note, Congressional Immunity and Conflict of Interest, 1965 Wis. L. Rev. 702.

A note on United States v. Johnson which brings up the issue of judicial jurisdiction over a congressman accused of bribery where delivery of a speech on the floor of Congress is an element of the alleged bribery. It suggests a choice between barring prosecution in order to uphold the integrity of independent legislative activity, or that bribery is a violation of the duties of public office which is subject to judicial inquiry.

Note, Absolute Privilege to Investigators for Congressional Committees, 63 Colum. L. Rev. 326 (1963).

A discussion of Wheeldin v. Wheeler, 302 F.2d 36 (9th Cir. 1962) involving an action for damages against a congressional committee investigator who allegedly exercised with malicious intent the subpoena power delegated to him. The case is considered in light of the developing law of personal immunity of administrative officials, and the problem of allowable extent of delegation of discretionary functions.

FEDERAL OFFICIALS

Blitz, Erosion of Official Immunity of Personnel Supervisors in the Public Sector, 8 Hastings Const. L.Q. 671 (1981).

This article identifies the areas in which a public personnel manager can injure constitutional interests of employees; it also analyzes the impact of Butz v. Economou, 438 U.S. 478 (1978), and the availability of a new remedy for constitutional transgressions committed by supervisors in the federal government.

Cass, Damage Suits Against Public Officers, 129 U. Pa. L. Rev. 1110 (1981).

This in-depth article reviews the law of official liability and attempts to assess the appropriate scope of personal damage liability for government officers. Cass probes into the value of official liability to secure appropriate official behavior and argues that it is a poor device to effect constraint of official authority. He feels that a better, if still imperfect, mechanism may be to hold the governmental enterprise, rather than the individual officer, liable for improper official conduct.

Note, Police Liability for Negligent Failure to Prevent Crime, 94 Harv. L. Rev. 821 (1981).

This note argues that the rule of law immunizing police officers from liability for negligent failure to prevent crime is not justified. A number of court decisions concerning attempts to recover against states and the federal government for negligent failure to prevent crime are discussed. The author calls for abandonment of the no-duty rule and adoption of an alternative liability approach. He discusses a number of proposals, arguing in favor of utilizing professional standards governing law enforcement crime prevention activity which would allow judicial review of all police activity, but would afford sufficient deference to police discretion.

Student Project, Constitutional Torts Ten Years After Bivens, 9 Hofstra L. Rev. 943 (1981).

This project attempts to define the legitimate contours of a federal cause of action for monetary redress for constitutional violations by establishing a normative theory for the judiciary's role. The authors conclude that the vitality of the Bivens cause of action is consistent with and compelled by the essence of civil liberties.

Burgess, Official Immunity and Civil Liability for Constitutional Torts Committed by Military Commanders After Butz v. Economou, 89 Mil. L. Rev. 25 (1980).

The author reviews the Supreme Court's decision in Butz v. Economou, and discusses its possible application to military commanders. It is argued that there is nothing to prevent application of this rule of law against commanders and that they could be sued and held personally liable for damages. She urges that commanders be made aware of this, and that remedial legislation be requested from Congress.

Comment, Bivens and the Creation of a Cause of Action For Money Damages Arising Directly From the Due Process Clauses, 29 Emory L.J. 231 (1980).

In assessing the due process developments since Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), this comment discusses the state of the law prior to Bivens, the Bivens decision itself, and the extension of the doctrine to the due process clauses of the fifth and fourteenth amendments. The author argues that recent cases have not provided the kind of guidance necessary to enable lower federal courts to make consistent decisions in the Bivens constitutional tort area.

Comment, Constitutional Tort Remedies: A Proposed Amendment to the Federal Tort Claims Act, 42 Conn. L. Rev. 492 (1980).

This article examines the inadequacies of remedies available to individuals under the Federal Tort Claims Act and other laws. The decision in Jaffee v. United States, 592 F.2d 712 (3d Cir. 1979) is used to point out the failure of existing statutes to provide relief for constitutional violations. The author also examines the monetary relief that is available and the exemptions affecting the rights of military men. The article closes with a discussion of various proposals to amend the Tort Claims Act, including two that would make the U.S. the exclusive party defendant in civil actions arising out of acts or omissions of government employees.

Comment, Executive Immunity For Constitutional Torts After Butz v. Economou, 20 Santa Clara L. Rev. 453 (1980).

This comment on Butz v. Economou: (1) redefines a constitutional tort as it has been shaped by recent decisions; (2) documents judicial attacks on executive immunity; (3) discusses Butz in term of expanding levels of immunity; and, (4) offers suggestions to develop standards for deciding constitutional tort issues.

Dolan, Constitutional Torts and the Federal Tort Claims Act, 14 U. Rich. L. Rev. 281 (1980).

After first describing the law of constitutional torts and official immunity, the author examines a proposal to amend the FTCA to make the government the exclusive defendant in constitutional tort suits. He warns that although this proposal could alleviate the current problems of unproductive litigation and failures to provide relief for tort victims, such an amendment must be closely watched to insure it will not create a new set of problems in the area of liability.

Note, Davis v. Passman: A Private Cause of Action For Damages Under the Fifth Amendment, 41 La. L. Rev. 275 (1980).

A note on Davis v. Passman, 442 U.S. 228 (1979), in which the author suggests that the decision left to future cases the responsibility for precisely defining the nature of the Bivens remedy and determining the point at which judicial extension of the Bivens rationale will end.

Note, Federal Executive Officials: Absolute Immunity For Common Law Torts, 47 Tenn. L. Rev. 859 (1980).

A chronological evaluation of the doctrine of qualified immunity culminating with the Butz v. Economou decision. The author applies this analysis to the holding in Granger v. Marek, 583 F.2d 781 (6th Cir. 1978).

Note, Government Officials Charged With Violating Serviceman's Fifth Amendment Rights Not Entitled to Absolute Immunity, 11 Seton Hall L. Rev. 275 (1980).

Note discussing Jaffe v. U.S., 592 F.2d 712 (3d Cir. 1979) in which the writer contends that arguments in favor of absolute immunity apply with far more force to negligent activity than to willful deprivations of constitutional guarantees.

Note, Qualified Immunity for Federal Officials: A Proposed Standard for Defamation Cases, 58 Tex. L. Rev. 789 (1980).

This note argues that the common law/constitutional tort distinction of Butz is invalid and proposes that qualified immunity be applied regardless of the tort involved. The author addresses the tort of defamation and proposes a new form of qualified immunity that is appropriate for defamation suits against federal officials.

Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 Harv. J. Legis. 1 (1979).

The then Attorney General argues that the huge increases in *Bivens* claims against government officials and suits against federal employees in their individual capacities on common-law tort theories for acts performed within the scope of their duties is not serving the public interest. A citizen's remedies against the United States for an alleged wrongful act by one of its employees are discussed, along with the problems facing the government in these suits. Finally, various legislative proposals before the Congress that would amend the Federal Tort Claims Act are discussed.

Butz v. Economou: The King Can Still Do Wrong, 6 W. St. U.L. Rev. 355 (1979).

This article discusses *Butz v. Economou*, and specifically deals with the policy considerations which led the Supreme Court to redefine the immunity protection of federal officials within the executive branch. It also discusses whether the Court's solution is indeed workable.

Comment, *FTCA: Liability of U.S. for Torts Committed in Good Faith by Federal Law Enforcement Officers*, 63 Minn. L. Rev. 1293 (1979).

This comment focuses on the Federal Tort Claims Act as it specifically relates to the decision in *Norton v. United States*, 581 F.2d 390 (4th Cir. 1978). The court held in favor of the plaintiff and declined the government's defense of good faith on the part of its officials. The author believes the decision to be overly restrictive and charges that the court failed to fully effectuate the remedial purposes of the FTCA.

Comment, *Scope of the Discretionary Function Exception Under the Federal Tort Claims Act*, 67 Geo. L.J. 879 (1979).

The case of *Wright v. United States*, 568 F.2d 153 (10th Cir. 1977) held, *inter alia*, that government liability for two deaths on a bridge constructed by the Department of the Interior was barred, due to the discretionary function exception of the Tort Claims Act. This article discusses the case and reviews the legislative history of the exception. Supreme Court and lower court interpretations of the exception are also examined. Finally, the tenth circuit's discussion in *Wright* is examined and compared with the other decisions. The decision is criticized as being too broad and too vague.

Klein, Degree of Immunity Applicable to Federal Executive Officials Arising Under the Constitution, 52 Temp. L.Q. 102 (1979).

Note discussing Butz v. Economou, centering on the idea that the right to be compensated for injury to a constitutionally protected interest by a government employee should not hinge on fortuitous circumstances such as whether that officer is employed by a state or the federal government.

Note, Absolute Immunity Denied Federal Administrative Official, 27 Kan. L. Rev. 688 (1979).

This note discusses the development of the competing immunities doctrines, the policy considerations for executive immunity, and the Supreme Court's construction of a qualified immunity in Butz v. Economou from a line of cases that perhaps suggested a different result.

Note, "Damages or Nothing" -- The Efficacy of the Bivens-Type Remedy, 64 Cornell L. Rev. 667 (1979).

The author discusses the obstacles that face a plaintiff in suits against federal officials for damages arising from alleged violations of constitutional rights. The author supports creation of a discrete statutory scheme to insure compensation to deserving plaintiffs because he feels merely waiving sovereign immunity would not significantly increase compensation.

Note, Davis v. Passman: Will Bivens Survive?, 41 U. Pitt. L. Rev. 131 (1979).

This note, written before the Supreme Court handed down its decision in Davis v. Passman, argues that the Supreme Court should reverse the Fifth Circuit's decision refusing to extend the scope of Bivens to imply a cause of action for damages from the due process clause of the fifth amendment. The author argues that Bivens-type remedies are an important link in the protection of individual liberties. The Bivens doctrine should remain broad and should insure that where rights protected by the Constitution are violated, there will be a remedy when there is no adequate statutory substitute.

Note, Governmental Immunities For Governmental Officials, 11 Urb. Law. 172 (1979).

In recent years, since Bivens v. Six Unknown Named Agents, the courts have been busy recasting the applicability of governmental immunities in all tort damage suits. This note discusses the immunity standards applied to federal officials as well as state officials.

Note, Scope of Immunity Available to Federal Government Officials, 1979 Wis. L. Rev. 604.

This note analyzes Butz v. Economou. It also traces the development of the immunity doctrine and evaluates the court's holding in Butz in light of the major precedents. The note also addresses alternative approaches to the issue of immunity for federal executive officials.

Qualified Immunity for Executive Officials for Constitutional Violations: Butz v. Economou, 20 B.C.L. Rev. 575 (1979).

This casenote discusses the doctrines of absolute and qualified immunity as they existed prior to Butz. This is followed by a treatment of the precedential and theoretical problems created by the Butz decision. Lastly, the probable distinction between constitutional and common-law claims created by Butz is discussed and criticized as untenable and unwarranted. The author argues that the Supreme Court should create a general rule of qualified immunity for executive officials in all cases.

Rothenburg, Qualified Immunity for Official Acts, 21 A.F.L. Rev. 433 (1979)

The author argues that the Supreme Court will never grant absolute immunity for official acts where constitutional violations result. Nor will the Court grant immunity to an official who has been sued as an individual and leave the plaintiff without a remedy as long as the Federal Tort Claims Act gives the government immunity for the discretionary acts of its officials. The author suggests that quality of executive decision making is degraded when it is done with one eye on the courthouse door. He calls for legislation to provides proper redress to the injured party while at the same time freeing officials from an unnecessary burden.

Baxter, Enterprise Liability, Public and Private, 42 Law & Contemp. Probs. 45 (Winter 1978).

This article is a commentary on Mashaw, "Civil Liability of Government Officers." Through creation and analysis of an analogus situation set in the context of the private sector, the author illustrates why Mashaw's proposal to impose a system of enterprise liability on individual agencies might not have the desired effect. The author agrees that such a system deserves a good deal more thought, but re-emphasizes his belief that damage remedies against a government enterprise must be viewed primarily as compensation mechanisms rather than behavior modifiers.

Comment, An Intolerable Accommodation: A Fresh Look at the Immunity Doctrine, 27 Am. U.L. Rev. 863 (1978).

Although recent Supreme Court decisions suggest a retreat from increasing the personal accountability of public officials, future developments will probably not involve any dramatic changes in doctrine. The author suggests that the Court should further shape the doctrine, and continue use of a legal test that, while sensitive to the difficulties of high office, also protects the rights of injured individuals and gives government officials incentive to act carefully.

Comment, Qualified Abrogation of Federal Executive Immunity: A Risky Experiment in Judicial Legislation, 19 S. Tex. L.J. 683 (1978).

The purpose of this comment is threefold: (1) to trace the history of executive immunity; (2) to provide insight as to where the doctrine stands today; and (3) to demonstrate that absolute immunity for high-ranking executive officials should be reinstated for the benefit of the public-at-large.

Epstein , Private-Law Models for Official Immunity, 42 Law & Contemp. Probs. 53 (Winter 1978).

This article, a commentary on Mashaw, "Civil Liability of Government Officers," opens with a discussion of the principles of the private law of tort in an effort to determine the extent to which private-law models of individual obligation can be used to aid in clarification of the proper scope of special immunity for government officials. The author concludes that while tort law should govern in some circumstances, the class of cases involving discretionary administrative acts cause the private-law models to break down. The article concludes with the statement that it is the courts that must strike the balance in this area.

Freed, Executive Official Immunity for Constitutional Violations: An Analysis and a Critique, 72 Nw. U.L. Rev. 526 (1978)

This article argues that the immunity doctrine presently applied by the federal courts is overly protective of executive officials who violate individuals' constitutional rights. The author suggests a compromise between the need to redress constitutional torts and the need to protect innocent public servants, through a rule which, with proper safeguards, recognizes the role which fault should play in an expanded qualified immunity doctrine.

Grodin, The Impact of Stencel Upon Sovereign Immunity Under the Exclusive-Remedy Provision of the Federal Employees Compensation Act, 30 JAG 209 (1978).

The author states that the extent of third-party liability limitation against suit where the injured party is a federal employee covered by the FECA has not been determined by the Supreme Court. Therefore, this comment examines and analyzes the elements of Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977) and compares these factors to an analogous situation under the FECA.

Mashaw, Civil Liability of Government Officers: Property Rights and Official Accountability, 42 Law & Contemp. Probs. 8 (Winter 1978).

This article examines the rationale for the official immunity doctrine with regard to civil actions based on negligence, that is, failure to exercise due care under the circumstances. The author does this by: (1) exploring the range of harms caused by government officers; (2) outlining existing laws of official immunity; (3) analyzing the alternatives to civil liability; and (4) discussing the effects of civil liability on the behavior of government officials.

Note, Balancing the Vindication of Constitutional Guarantees Against the Effective Functioning of Government: The Official Immunity Scale Does Not Work, 28 De Paul L. Rev. 143 (1978).

This note on Butz v. Economou outlines the doctrine of official immunity as it exists today, analyzes the basis of the Supreme Court's decision and comments on the deficiencies of the official immunity doctrine. Finally, it discusses an alternative approach for balancing the competing issues.

Note, The Discretionary-Function Exception to the Federal Tort Claims Act, 42 Alb. L. Rev. 721 (1978).

This Note discusses the district court decision in Birnbaum v. United States, 436 F. Supp. 967 (E.D.N.Y. 1977) that the exemptions in the Federal Tort Claims Act do not apply to a C.I.A. mail-opening scheme. The legislative history of the discretionary-function exception is discussed, as are two tests developed by federal courts for determining whether particular government functions are discretionary. The author believes that although the Birnbaum decision's addition of a new factor to the tests might have some conceptual and practical problems, it does have strong policy advantages. The major benefit is allowing suits in tort where the government initiates illegal programs.

Olson, Official Liability and its Less Legalistic Alternatives, 42 Law & Contemp. Probs. 67 (Winter 1978).

This article is a commentary on Mashaw, "Civil Liability of Government Officers." The author, a professor of economics, tries to provide a framework for debating the issue of official immunity by discussing in a very broad context how government bureaucracies work to achieve social purposes and why elimination of official immunity cannot solve the problem of the inadequacies of bureaucracies and indeed, cannot even touch the largest part of that problem.

Bermann, Integrating Governmental and Officer Tort Liability, 77 Colum. L. Rev. 1175 (1977).

According to the author, the lowering of the shield of immunity from government and its officers has created a problem of coordination. After briefly discussing the current status of sovereign and individual officer immunity, the author discusses a number of problems that have arisen because, as he argues, courts and legislatures have not thought out their decisions to include both governmental and officer liability, leaving the relationship between the two ill-defined. The author next discusses some alternatives to this parallel system, primarily focusing on government based liability with the option of later redress against the official if the government deemed it necessary. The article ends with a discussion of recent developments in governmental tort law in France and Germany.

Casto, Barr v. Mateo and the Problem of Coequal Protection For State and Federal Administrators, 13 Tulsa L.J. 195 (1977).

This article explores the propriety of a dual system of official immunities as first expounded in Barr v. Mateo, 360 U.S. 564 (1959). That decision has been interpreted as establishing a broad doctrine of absolute immunity for federal administrators, while other decisions indicate that state administrators are only entitled to qualified immunity.

Jacoby, Roads to the Demise of the Doctrine of Sovereign Immunity, 29 Ad. L. Rev. 265 (1977).

Adoption of Pub. L. No. 94-574 (90 Stat. 272), which partially eliminated the defense of sovereign immunity, seems to have succeeded in undoing some of the worst shortcomings in the area of sovereign immunity. The author calls for additional comprehensive study on possible revisions to some aspects of the Tucker Act, such as the non-liability of the government under contracts implied in law, and broad areas now excluded from Federal Tort Claims Act liability, such as the non-application of the absolute liability doctrine, or the statutory exclusion of affirmative relief even when a discretionary function is abused.

Lehmann, Bivens and Its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials, 4 Hastings Const. L.Q. 531 (1977).

The purpose of this article is threefold: (1) to determine what the Supreme Court held in Bivens v. Six Unknown Named Agents; (2) to analyze how lower federal courts have applied and extended the holding of Bivens; and (3) to consider which extentions have a legitimate basis in the language of the Court opinion and to determine what special advantages arise from basing a lawsuit on Bivens.

Note, A Federal Executive Official Will Not Be Accorded Absolute Immunity From an Action for Malicious Institution of Administrative Proceeding Because Performance of Executive Duties is Adequately Protected By a Qualified Immunity, 45 Geo. Wash. L. Rev. 861 (1977).

Note which suggests that the court in Economou v. United States Dept. of Agriculture, 535 F.2d 688 (2d Cir. 1976) discarded the rule established by the Supreme Court in Barr v. Matteo, 360 U.S. 564 (1959) that executive officials are entitled to absolute immunity from suit for common law torts committed by them in their official capacities. In doing so, the court failed to recognize the distinction between actions based on common law and those alleging violation of constitutional rights.

Note, Action For Damages -- Vicarious Liability of a Federal Official, 12 Land & Water L. Rev. 737 (1977).

An evaluation of Kite v. Kelley, 546 F.2d 334 (10th Cir. 1976) in terms of the court's holding that the doctrine of vicarious liability has no application in a civil rights action for damages against a federal official. According to the author, this could result in there being no adequate remedy for injured parties and the public could be deprived of an effective means of holding public officials accountable for unconstitutional conduct.

Note, Economou v. United States Department of Agriculture: Blurring the Distinctions Between Constitutional and Common Law Tort Immunity, 18 Wm. & Mary L. Rev. 628 (1977).

The author reviews a Second Circuit Court of Appeals decision that officials of the Department of Agriculture and a subordinate agency were entitled to qualified immunity. It is argued that the court reached the right decision, but for the wrong reason because it failed to recognize the distinctive features of constitutional torts that may compel the grant of qualified immunity to government executives According to the author, the Second Circuit erroneously equated common-law tort immunity with the immunity granted in suits alleging deprivation of constitutional rights. Because the author feels a qualified immunity standard, rather than absolute immunity, should apply to common-law torts as well as constitutional torts, he supports the decision.

Note, Federal Executive Immunity From Civil Liability in Damages: A Reevaluation of Barr v. Matteo, 77 Colum. L. Rev. 625 (1977).

This note examines the decisions in Barr and § 1983 cases, as well as lower court cases that have attempted to reconcile those decisions. It compares the interests at stake in tort actions against federal officials and § 1983 claims against state officers in order to discern possible differences justifying different standards of immunity. Finally, it discusses the functional approach to immunity followed in § 1983 cases and recommends that Barr be overruled in favor of this method of analysis.

Note, Federal Executive Officials Sued For Alleged Violations of Constitutional Rights Entitled Only to a Qualified Immunity, 53 Tul. L. Rev. 955 (1977).

A discussion of the justification for executive immunity relying on 2 bases: (1) it is unjust to hold executive officials liable for the exercise of their discretion, especially in the absence of bad faith; and (2) if the imposition of liability is possible, executive officials may be hesitant to carry out their duties.

Boger, Gitenstein & Verkuil, The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis, 54 N.C.L. Rev. 497 (1976).

This article describes the 1974 amendment to the Federal Tort Claims Act, the events which led to its enactment, and the methods suggested by the authors, by which it should be interpreted and implemented by the bar and by the courts. The authors believe that particular attention should be given to the legislative history of the amendment by the bar and courts. This will allow the amendment to serve as a spur to greater reform of the sovereign immunity doctrine.

Comment, Accountability for Government Immunity: Limiting Qualified Immunity and the Good Faith Defense, 49 Temp. L.Q. 938 (1976).

The author focuses on the civil damages remedy for official deprivations of constitutional rights, exploring the conflict between the protections afforded by the Bill of Rights and § 1983, and the policies underlying the doctrine of official immunity. A number of police misconduct cases are examined and the implications of their holdings discussed. The author calls for rejection of the standard adopted by the Supreme Court in Bivens II because he feels application of a lesser standard (good faith and reasonable belief) in civil cases than in criminal cases has created a dichotomy in the thrust of the fourth amendment.

Comment, Scope of Immunity From Damage Actions Available to Administrative Agency Officials, 30 Rut. L. Rev. 209 (1976).

This comment examines the court's reasoning in Economou v. United States Dept. of Agriculture for departing from the traditional application of the federal official immunity doctrine. It also suggests a framework for analysis of immunity questions.

Harris & Schnepper, Federal Tort Claims Act: Discretionary Function Exception Revisited, 31 U. Miami L. Rev. 161 (1976).

The authors attempt to refute the idea that the federal courts have taken confusing and inconsistent positions with regard to the discretionary-function exception to the FTCA. This is accomplished by analyzing recent opinions and finding a trend which has led to a less confusing and more definite framework depending upon certain factors which appear in every case. By analyzing these factors, the authors conclude that the outcome in this area will be susceptable to a higher degree of predictability.

Mayer, Immunity Denied to Federal Officials Failing to Perform Discretionary Duties, 35 Fed. B.J. 206 (1976).

A discussion of Estrada v. Hills, 401 F. Supp. 429 (N.D. Ill. 1975) which argues that the best solution for compensating victims of government negligence is for Congress to approve those amendments to the Federal Tort Claims Act which propose an exclusive remedy.

Murchison, Waivers of Intergovernmental Immunity in Federal Environmental Statutes, 62 Va. L. Rev. 1,177 (1976).

The author examines several Supreme Court decisions concerning the extent to which Congress intended the environmental statutes to waive federal immunity from state regulation. The statutes require federal agencies to comply with state environmental requirements. The decisions are criticized for strictly construing the waivers, and establishing a distinction between substantive and procedural regulations that the author feels will impede the achievement of the goals the environmental statutes.

Note, Congressional Control of Agency Privilege, 9 U. Mich. J.L. Ref. 348 (1976).

This note provides an introductory and largely historical analysis of "agency privilege," -- the refusal of federal executive officials to furnish information and documents to congressional bodies in the absence of a claim of privilege by the President.

Note, *Damages for Federal Employment Discrimination: § 1981 and Qualified Executive Immunity*, 85 Yale L.J. 518 (1976).

This note argues that personal liability of government officials can be provided by an alternative remedy for racial discrimination in federal employment: an independent action for damages and back pay against federal officials, brought under 42 U.S.C. § 1981 and tailored by the doctrine of qualified executive immunity.

Abernathy, *Sovereign Immunity in a Constitutional Government: The Federal Employment Discrimination Cases*, 10 Harv. C.R.-C.L. L. Rev. 322 (1975).

The author provides an in-depth review of the application of the sovereign immunity doctrine in one particular area of the law -- employment discrimination suits against federal officials. He also makes a general argument that the sovereign immunity doctrine reflects the allocation of power among the three branches of government, and that certain courts have misapplied the Supreme Court's basic rules of sovereign immunity in employment discrimination cases.

Berger, *Congressional Subpoenas to Executive Officials*, 75 Colum. L. Rev. 865 (1975).

A discussion of the issues surrounding congressional subpoenas which includes: (1) a survey of the historical roots of judicial review of congressional subpoenas; (2) an evaluation of the considerations governing judicial review of congressional subpeonas issued to private individuals; (3) the applicability of such considerations to congressional subpoenas issued to executive officials; and (4) the various methods of enforcement regarding executive officials.

Justice Department Officials Given Qualified Immunity in Civil Damages Action, 21 Wayne L. Rev. 1141 (1975).

A casenote on *Bivens v. Six Unknown Named Agents*, in which the author analyzes the Supreme Court's rationale and argues that the utilization of authority dealing with federal judicial review of state officials' actions to determine standards for review of the acts of federal officials is a disservice to the principles inherent in a system of government encompassing co-equal branches.

McManis, Personal Liability of State Officials Under State and Federal Law, 9 Ga. L. Rev. 821 (1975).

This article begins with a broad overview of sovereign and official immunity, both in the federal government and under Georgia law. The personal liability of state officials under the Civil Rights Act and various state laws is examined in some detail in an attempt to determine the scope of liability. The article ends with a brief discussion on means of lessening the impact of personal liability with a focus on liability insurance. The author argues that the antidotes to personal liability are clearly defined procedures, drafted with an eye toward protecting the rights of individuals, and well-trained and supervised personnel who are themselves accorded fair treatment.

Clark, Discretionary Function and Official Immunity: Judicial Forays into Sanctuary from Tort Liability, 16 A.F.L. Rev. 33 (1974).

This article argues that the courts are narrowing both the application of the discretionary function exception under the Federal Tort Claims Act, and the official immunity doctrine in individual damage actions. The balance between society's interests in redressing individual wrongs and in sparing our officials the burden of justifying their decisions is, according to the author, clearly shifting.

Horlbeck & Harkness, Executive Immunity and the Constitutional Tort, 51 Den. L.J. 321 (1974).

The authors undertake an examination of the justification for and the operation of the doctrine of official immunity, and attempts to determine the role executive immunity should play in constitutional tort cases. They concluded that the traditional test for determining whether immunity is available -- scope of authority and discretionary function -- should be amended by incorporating as a third element the good faith defense which is currently an independent defense.

Nahmod, Section 1983 and the "Background" of Tort Liability, 50 Ind. L.J. 5 (1974).

This article examines how courts have applied the "background of tort liability" dictum from Monroe v. Pape, and discusses the relevance of tort concepts in a section 1983 context, including issues of duty and standard of conduct, negligence, constitutional duty, and proximate cause. A brief overview is also provided of section 1983 defenses, cinluding good faith and reasonableness, and consent. The author warns that courts in section 1983 cases must be careful not to let tort law alone determine section 1983 liability.

Note, Edelman v. Jordan: Protection of the Government or Protection From the Government?, 29 U. Miami L. Rev. 144 (1974).

A note commenting on Edelman v. Jordan, 415 U.S. 651 (1974) which praises the Supreme Court's decision for bringing a new perspective to the archaic doctrine of sovereign immunity while reinforcing the idea that the Constitution is meant to serve as a limit on the federal government.

Note, Executive Privilege May Not Be Asserted as a Defense to an Action for Damages for Deprivation of Constitutional Rights Without Showing Probable Cause, 18 How. L.J. 477 (1974).

A discussion of Sparrow v. Goodman, 361 F. Supp. 566 (W.D.N.C. 1973), a ruling which departs from the usual line of cases dealing with executive privilege, but one which is well-founded in common law. The author praises the court for properly recognizing the danger of allowing federal officers to escape liability at the expense of constitutional violations.

Note, Sovereign Immunity -- Scheuer v. Rhodes: Reconciling § 1983 Damage Actions With Governmental Immunities, 53 N.C.L. Rev. 439 (1974).

The author credits the Supreme Court with initiating a reevaluation of government immunity justification and for proposing a workable qualified immunity standard with regard to alleged abuses of discretionary power. Even though the Court has recognized the necessity for individual accountability in § 1983 actions, the next step is to assure that the accountability be extended to the government.

Reynolds, *Strict Liability Under the Federal Tort Claims Act: Does "Wrongful" Cover a Few Sins, No Sins, Or Non-Sins?*, 23 Am. U.L. Rev. 813 (1974).

This article attempts to determine the scope of the liability that may be imposed under the Federal Tort Claims Act for "ultrahazardous" activity in light of the Supreme Court decision in *Laird v. Nelms*, 406 U.S. 797 (1972). The author argues that the Act should be construed to include strict liability for ultra-hazardous activities.

Inadequacies of Federal Sovereign Immunity: A New Perspective, 61 Geo. L.J. 1535 (1973).

This article reviews the status of federal sovereign immunity under the Federal Tort Claims Act and the Tucker Act. The author argues in support of a complete elimination of the sovereign immunity defense by a statutory amendment that consolidates the current provisions permitting suit into a single statement making the United States liable, as a private person, for any acts or omissions of its employees or agents within the scope of their authority.

Note, *Bivens v. Six Unknown Named Agents: A New Direction in Federal Police Immunity*, 24 Hastings L.J. 987 (1973).

In exploring the result of *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339 (2d Cir. 1972) this note traces: (1) the conflicting approaches to the immunity doctrine prior to *Bivens* and the double standard which afforded federal police an immunity denied state police; (2) the reasoning of the decision, its probable impact on other federal jurisdictions, and its effect upon individual federal police officers; and (3) the issues left unresolved by the *Bivens* decision.

Note, *Utility, Fairness and the Takings Clause: Three Perspectives on Laird v. Nelms*, 59 Va. L. Rev. 1034 (1973).

The author criticizes the Supreme Court holding in *Laird v. Nelms*, 406 U.S. 797 (1972) that the Federal Tort Claims Act does not allow the government to be sued in strict liability. The decision is described as having tenuous statutory construction, and myopic disregard of principles of constitutional law. The author uses three arguments in attacking the decision: a utilitarian argument advocating imposing enterprise liability on the government to generate efficiency, the fairness of subjecting citizens to unequal risks without the offer of compensation, and the failure to allow recovery when the government destroys private properly.

Peck, Laird v. Nelms: A Call For Review and Revision of the Federal Tort Claims Act, 48 Wash. L. Rev. 391 (1973).

This article evaluates Laird v. Nelms in its historical context, criticizing the Supreme Court's rationale and outlining the problems the decision creates. The author argues that unless the Federal Tort Claims Act is amended to reject the decision, its coverage will be greatly reduced. This will result from liabilities being limited to those based upon proof of wrongdoing from liabilities being limited to those based upon proof of wrongdoing by employees for which the government is responsible on a respondeat superior basis.

Comment, Sovereign Immunity -- An Anathema to the "Constitutional Tort", 12 Santa Clara Law. 543 (1972).

This comment analyzes Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972), with emphasis placed on the nature of the cause of action and its relation to the government in terms of the conflicting interests of the federal courts in safeguarding an individual's constitutional rights and Congress' precluding certain suits against the government.

Jones & Davis, Recovery of Compensation From the Federal Government Where No Legal Action May Be Maintained: Profile of a Congressional Reference Case, 28 Mo. B.J. 69 (1972).

This article discusses the elaborate procedures involving cases of "Congressional Reference," a process where a claim against the government, which is without legal remedy is satisfied by private bill. In order to fully explain this process, the authors examine Sherman Webb et al. v. United States, 192 Ct. Cl. 925 (1970), an action based on such a proceeding.

Ausness, The Effect of Sovereign Immunity On Environmental Protection Suits Against Government Officials, 6 Val. U.L. Rev. 1 (1971).

This article traces the development of the immunity doctrine and considers its present and potential impact on environmental litigation.

Davis, Sovereign Immunity Must Go, 22 Ad. L. Rev. 383 (1970).

Professor Davis argues in support of an amendment to the Administrative Procedure Act to abolish sovereign immunity in suits in federal courts for specific relief. According to the author, sovereign immunity: (1) often causes serious, substantive injustice; (2) allows final determinations without regard to procedural justice; and (3) causes gross inefficiency in the allocation of functions between officers and agencies, by preventing courts from resolving issues and controversies they are especially qualified to resolve.

Sherry, The Myth that the King Can Do No Wrong: A Comparative Study of the Sovereign Immunity Doctrine in the U.S. and N.Y. Court of Claims, 22 Ad. L. Rev. 597 (1970).

This article supports the thesis that popular disenchantment with judicial supervision of public administration is traceable to a preoccupation with the concept of sovereign immunity. The author challenges the assumption that the creation of judicial forums in which the sovereign may be sued ipso facto vitiates the sovereign immunity doctrine.

Cahn & Cahn, The New Sovereign Immunity, 81 Harv. L. Rev. 929 (1968).

The authors discuss the difficulties that are inherent in legal actions brought to force an agency to comply with a governing statute or internal regulations. They advocate establishing a citizens advocacy center to investigate complaints and monitor the discretionary actions of federal officials.

Reynolds, The Discretionary Function Exception of the Federal Tort Claims Act, 57 Geo. L.J. 81 (1968).

In an attempt to provide some guidelines to assist courts in applying the discretionary function exception to the Tort Claims Act, the author takes an in-depth look at court decisions and commentaries concerning the exception. He recommends that the variety of tests used in the past be dropped in favor of the "operational-planning" test which should also help to keep the discretionary function exception from swallowing the Act.

Comment, Immunity of Federal Officials from Civil Liability in Antitrust Suits, 19 Stan. L. Rev. 1,101 (1967).

This comment discusses: (1) the meaning of "scope of authority" and "acting within the outer perimeter of their line of duty," and (2) the extension of the immunity doctrine set forth in Barr v. Matteo to exempt government officials from liability for statutory violations and common-law torts other than libel and slander.

Dwyer, Responsibility of the Federal Government For Acts of Its Officials, 11 Rocky Mtn. Min. L. Inst. 395 (1966).

This article suggests that the doctrine of sovereign immunity is in a state of disrepute, without valid justification for its existence. The author contends that the doctrine gained its current status from continued use in cases where its presence was unwarranted.

Mikva, Sovereign Immunity: In a Democracy the Emperor Has No Clothes, 1966 U. Ill. L.F. 828.

This article is limited to a discussion of sovereign immunity in suits against the federal government. The primary focus is on the Federal Tort Claims Act, with particular attention to the exemptions outlined in sections 2680(a) and 2680(h) of the Act.

Note, Immunity of Public Official From Liability Under the Federal Civil Rights Act, 18 Ark. L. Rev. 81 (1964).

A survey of cases analyzing the difficulty of using the Civil Rights Act to protect an individual from official oppression, while at the same time, not subjecting honest, conscientious officials to the harrassment of vexatious litigation.

Abend, Federal Liability for Takings and Torts: An Anomalous Relationship, 31 Fordham L. Rev. 481 (1963).

This article opens with a discussion of the influence that the "contract theory" had, both before and after adoption of the Tucker Act, on suits against the U.S. This theory gradually diminished, although not disappearing, while the theory of claims standing alone on the Constitution gained strength. The author discussed the adoption of the Federal Tort Claims Act and criticizes the situation that developed where it appears recovery under the Tucker Act for tortious conduct can sometimes be greater than can be obtained under the Tort Claims Act. This results from the considerable interplay between the two statutes in the area of torts and "takings." The author suggests the possible remedy of repealing the exceptions to the Tort Claims Act.

Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1 (1963).

The author addresses himself to the history of sovereign immunity as applied to suits against administrative officers in England and the U.S. He analyzes English precedents to show that relief was available against the King's officers. He then shows how English doctrines not thought to involve the doctrine of sovereign immunity were preserved in American law, and protests the tendency of recent cases to explain these actions in terms of sovereign immunity.

Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev. 209 (1963).

In this article, Part II of a series, the author examines the immunities of officers and of the state and the role of the damage action against the office and the state. The general treatment of the discretionary function is discussed. The author emphasizes the difficulty of making a determination of liability in case, involving negligence because of what amounts to "second guessing" the government decision.

Note, Actions "In Substance and Effect" Against the Government, 17 Rut. L. Rev. 475 (1963)

A discussion of Malone v. Bowdoin, 369 U.S. 643 (1962) presenting an historical analysis of official immunity beginning with United States v. Lee, 106 U.S. 196 (1882). The author concludes that: (1) Congress seems to prefer suits against the U.S. rather than its officers; (2) the decision in Malone is unnecessarily broad; and (3) the decision may tend to inhibit a growth of the law that would allow all parties to obtain relief from injury caused by the government.

The Supreme Court Refused to Expand the Exception to the Rule that the Doctrine of Sovereign Immunity Will Bar Suits Which Seek Specific Relief Against Federal Government Officials, 24 U. Pitt. L. Rev. 631 (1963).

A case note on Malone v. Bowdoin, which argues that the Supreme Court is not the proper institution to originally set the standard for determinations which affect the basic relationship between the state and the individual.

Becht, The Absolute Privilege of the Executive in Defamation, 15 Vand. L. Rev. 1127 (1962).

In answering the question, should executive officers have an absolute privilege to commit defamation, the author traces the evolution of the immunity privilege from its origin in England, through American state and federal courts. After balancing the factors for and against absolute immunity, the writer reaches the conclusion that officials should receive only a qualified privilege in defamation.

Comment, Suits Against Officers of the Federal Government, 16 Vand. L. Rev. 231 (1962).

An historical look at the doctrine of sovereign immunity as it applies to the Supreme Court's holding in Malone v. Bowdoin.

Hardin, Executive Privilege in the Federal Courts, 71 Yale L.J. 879 (1962).

The author contends that the executive branch has not cooperated with the judiciary to the extent that it properly should and safely could, and the courts' virtually unilateral efforts to avoid open conflict with executive officers have had some deplorable effects on the administration of justice.

Note, Suit for Specific Relief Against Federal Officers -- United States Not a Necessary Party, 59 Mich. L. Rev. 1270 (1961).

An examination of Bowdoin v. Malone, 284 F.2d 95 (5th Cir. 1960) in which the author attempts to clarify the extent to which the doctrine of sovereign immunity applies in suits against government officials, as opposed to suits against the U.S. itself.

GENERAL

Comment, Sovereign Immunity: A Modern Rationale in Light of the 1976 Amendments to the Administrative Procedure Act, 1981 Duke L.J. 116.

The comment examines the historical explanations for the doctrine of sovereign immunity as applied in non-statutory review actions and the doctrine's purposes in modern society. The author reviews the case law since the 1976 amendments to the Administrative Procedure Act to discover if the decisions comport with the doctrine's modern rationale.

Note, Official Immunity in Federal Court: Supreme Court of Virginia v. Consumers Union of the United States, 67 Cornell L. Rev. 188 (1981).

The author discusses the scope official immunity as developed and applied to state and federal executive, legislative and judicial officers by the Supreme Court. The recent decision Supreme Court of Virginia v. Consumers Union of United States, 446 U.S. 719 (1980) holding that the doctrine of legislative immunity bars a federal court from issuing an injunction against state court judges for promulgating rules regulating attorney conduct is examined. The decision is criticized for what is seen as a failure to consider the consitutional roots of official immunity.

Schuck, Suing Our Servants: The Court, Congress and the Liability of Public Officials for Damages, 1980 Sup. Ct. Rev. 281.

A discussion of Supreme Court's decisions during the 1979 terms expanding judicially sanctioned official and governmental liability. The author suggests that the trend toward holding public agencies and officials liable will produce less deterence of illegality, less vigorous decision-making and less equity.

Weeks, Personal Liability Under Federal Law: Major Developments Since Monell, 13 Urb. Law. 263 (1980).

This article reviews various changes that have come about since Monell v. Dept. of Social Services, 436 U.S. 658 (1978). The areas discussed are: redefinition of immunity for federal executive officials; liability of state agencies; decrease of Congressional immunity; and, the issue of liability arising out of negligent conduct.

Fox, The King Must Do No Wrong: A Critique of the Current Status of Sovereign and Official Immunity, 25 Wayne L. Rev. 177 (1979).

This article attempts to define the scope of sovereign immunity by reviewing significant cases involving the doctrine. The author analyzes the cases in light of the competing policies involved when immunity is raised, and explains a proper balance between providing adequate redress for those harmed and shielding public servants from liability in order to promote unfettered decision-making.

Stewart, The Enforcement of Judgements Against the United States, 12 Creighton L. Rev. 815 (1979).

Discussion of the judiciary's power to enforce a judgement for taking of property without relief, against the United States made possible by a waiver of immunity. The author argues that in the context of the fifth amendment, courts do have enforcement power, irrespective of congressional appropriation.

Boyer, Civil Liability for Prejudicial Pre-Trial Statements by Prosecutors, 15 Am. Crim. L. Rev. 231 (1978).

The author makes an analysis of the doctrine of prosecutorial immunity in light of the decision in Imbler v. Pachtman, 424 U.S. 409 (1976) and comes to the conclusion that a cause of action may lie under the Civil Rights Act to provide a remedy to defendants deprived of their right to a fair trial, due to pre-trial statements made by a prosecutor. Justice is best served, according to the author, by removing the shield of absolute prosecutorial immunity when such statements are made.

Friedman, Developments in Constitutional Law -- The Good Faith Defense in Constitutional Litigation, 5 Hofstra L. Rev. 501 (1977).

The author examines the decisions that have narrowed the scope of immunity for government officials -- federal, state and local -- whose actions are under attach. The development of the "good faith" defense and the Supreme Court's decisions are examined, as well as lower federal court decisions that amplified the holdings in those cases. The author lays out the chief features of the good faith defense.

Note, The Continued Restriction of the Federal Government's Immunity from State Taxation, 26 De Paul L. Rev. 874 (1977).

The author discusses the Supreme Court decision United States v. County of Fresno, 429 U.S. 452 (1977) upholding the right of two California counties to tax federal employees on their possessory interest in tax-exempt housing owned by the federal government. The note reviews the two-step process used by the Court in determining the constitutionality of the state tax.

Comment, Edelman v. Jordan: The Case of the Vanishing Retroactive Benefit and the Reappearing Defense of Sovereign Immunity, 12 Hous. L. Rev. 891 (1975).

The purpose of this comment on Edelman v. Jordan, 415 U.S. 651 (1974) is to explore possible means of minimizing the effect of the decision and to assess its departure from earlier decisions in terms of legislative, social and judicial history and objectives.

Vaughn, The Personal Accountability of Public Employees, 25 Am. U.L. Rev. 85 (1975).

The author traces the development of public employee liability in tort for acts committed in the course of public employment. After doing this, he proposes an alternative approach to public employee accountability. Vaughn advocates adopting a procedure to allow a private citizen to invoke the civil service system to act against public employees. The Swedish system for public employee accountability, which is similar to Vaughn's proposal, is discussed.

Comment, Participant Governmental Action Immunity From the Antitrust Laws: Fact or Fiction?, 50 Tex. L. Rev. 474 (1972).

The author discusses whether an agency delegated authority by a legislative body to accomplish a certain goal is immune from the antitrust laws if it participates in a transaction subject to antitrust challenge. The author recommends a distinction be made between "governing" and "procurement" activities for antitrust immunity. He feels the procurement function should be included under the antitrust laws.

Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1532 (1972).

An examination of the Supreme Court's logic and the implication of its decision in Bivens v. Six Unknown Named Agents, which held that one whose fourth amendment rights have been violated by a federal officer has a cause of action for money damages based directly on that amendment. The author discusses the purpose of the fourth amendment, the power to infer remedies directly from the Constitution, and the respective institutional roles of the Court and the Congress in the implementation of the Constitution. The author argues that the court should be free to apply the same standard in creating constitutionally based remedies as it does in effectuating federal statutes, and that Congress may modify, within limits, judicially created remedial mechanisms inferred directly from constitutional provisions.

Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U. Colo. L. Rev. 1 (1972).

This article discusses constitutional doctrines that have changed quite subtly but nonetheless radically during recent years. The author endeavors to show the contrast between the modern immunity doctrines and earlier American law, and to trace the process of conceptual confusion by which modern rules have gradually supplanted the old.

Cramton, Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant, 68 Mich. L. Rev. 389 (1970).

The author discusses the development of the doctrine of sovereign immunity in federal courts and argues in support of legislative measures to: 1) eliminate sovereign immunity as a barrier to judicial review of administrative action; 2) expand subject matter jurisdiction of U.S. district courts to accommodate such review, and to provide a remedy against the U.S. for the resolution of property disputes; and 3) eliminate the remaining technicalities concerning the identification, naming, capacity, and joinder of parties defendant in actions challenging federal administrative action.

Comment, The American Doctrine of Sovereign Immunity: An Historical Analysis, 13 Vill. L. Rev. 583 (1968).

This comment traces the historical evolution of sovereign immunity and analyzes the case law that has developed. It discusses the inter-relationship between the judiciary and the executive with special emphasis on whether the executive can have any influence on judicial formulation of the substantive doctrine of sovereign immunity.

Kramer, The Governmental Tort Immunity Doctrine in the United States 1790-1955, 1966 U. Ill. L.F. 795.

The doctrine of governmental immunity has persisted in various forms for hundreds of years and in many countries, and has been used to shield almost every conceivable type of political entity from suit. This article attempts to explain why this doctrine has endured for such a lengthy period of time.

Note, Tort Immunity of Minor Governmental Officials, 14 Clev.-Mar. L.R. 365 (1965).

The author discusses the issues that federal and state courts have considered in civil suits against public officials, including scope of authority, malice or ulterior motives, and discretion. The historical development of the doctrine of immunity is traced from its English roots. The author argues that federal courts are more willing than state courts to extend immunity to lower-ranking public officials.

Roady, Lee, Land, Larson, and Malone -- Sovereign Immunity Revisited, 43 Tex. L. Rev. 1062 (1965).

The author discusses four Supreme Court decisions involving the doctrine of sovereign immunity using the format of an epic poem. The four cases concerned the taking of property by the government without compensating the owners.

Littlefield, Stare Decisis, Prospective Overruling, and Judicial Legislation in the Context of Sovereign Immunity, 9 St. Louis U.L.J. 56 (1964).

The author discusses a number of court decisions applying or refusing to apply the doctrine of sovereign immunity in light of the principle of stare decisis, and examines the use by courts of prosective overruling of the doctrine of sovereign immunity.

Lawton, Disintegration of Governmental Immunity, 30 Ins. Couns. J. 251 (1963).

A survey of court decisions which found occasion to re-evaluate the concepts of governmental and charitable immunity. A number of courts have rejected one or both of these common-law principles. The author attempts to clarify the interaction of these principles.

JUDICIAL IMMUNITY

Note, Judicial Immunity: Developments in Federal Law, 33 Baylor L. Rev. 351 (1981).

This note discusses the development of the federal doctrine of judicial immunity, and the implied perimeters of judicial jurisdiction and function. It also considers the possible effects of traditional immunity upon liability of judges for attorney's fees and injunctive relief.

Note, Official Immunity in Federal Court: Supreme Court of Virginia v. Consumers Union of the United States, 67 Cornell L. Rev. 188 (1981).

The author discusses the scope of official immunity as developed and applied to state and federal executive, legislative and judicial officers by the Supreme Court. The recent decision, Supreme Court of Virginia v. Consumers Union of United States, 446 U.S. 719 (1980), holding that the doctrine of legislative immunity bars a federal court from issuing an injunction against state court judges for promulgating rules regulating attorney conduct is examined. The decision is criticized for what is seen as a failing to consider the constitutional roots of official immunity.

Note, The Right to Attorney Fees Versus Governmental Immunity, 1981 Det. C.L. Rev. 127.

The sole issue discussed in this note concerning Supreme Court of Virginia v. Consumers Union of the United States is the role the Virginia court played in relation to the Bar Code and the consequential effect on the plaintiff's entitlement to attorneys' fees. In other words, if the court is deemed to have acted in a legislative capacity, is the court immune from liability under the doctrine of legislative immunity?

Way, A Call for Limits to Judicial Immunity: Must Judges Be Kings In Their Courts?, 64 Judicature 390 (1981).

The author questions whether judges should have a qualified form of immunity, similar to that accorded to executive officials, or whether the present doctrine of absolute immunity is required. In deciding on the former, the author contends that qualified immunity would still protect judges from suits by disgruntled litigants, but not from suits by those who can prove judicial negligence or malice.

Block, Stump v. Sparkman and the History of Judicial Immunity, 1980 Duke L.J. 879.

The author provides a detailed history of the doctrine of judicial immunity in English law and in the United States courts. The Supreme Court's decision in Stump v. Sparkman, 435 U.S. 349 (1978) that a judge is absolutely immune from suits for damages for his judicial acts, unless he acted in the clear absence of subject matter jurisdiction, is examined at length. The author argues in support of the principle that judicial immunity should not be available when the actions complained of prevented the complainant from seeking normal appellate correction of error.

Comment, Derivative Immunity for Private Attempts to Corrupt the Judiciary in Violation of 42 U.S.C. § 1983, 14 Ga. L. Rev. 344 (1980).

Comment on Sparks v. Duval County Ranch Co., 588 F.2d 124 (5th Cir. 1979) that analyzes the problems faced by the courts when the question of derivative immunity arises with regard to private co-conspirators. The writer agrees with the court's decision that immunity should never be permitted to be a means of defending judicial corruption. However, he feels the court might have overstepped its bounds in abolishing the doctrine altogether, including circumstances where the private person is acting in good faith in obedience to a judicial order.

Comment, Private Party Liability in Section 1983 Actions Alleging Conspiracy With Absolutely-Immune State Actors, 1980 Wis. L. Rev. 1056.

This comment examines three methods by which federal courts limit private-party liability under a section 1983 conspiracy based cause of action: (1) imposition of a particularized pleading requirement when conspiracy on concerted action with an absolutely immune state official is alleged; (2) use of the absolute immunity of the state actor to create a jurisdictional defect; and (3) application of derivative immunity to shield the private party from liability. The author argues that of the three approaches, only the first is legally sound. The author believes that the Supreme Court's reaffirmation of near-absolute judicial immunity in Stump v. Sparkman, coupled with lower court decisions expanding the classes of officials entitled to both qualified and absolute immunity will only encourage the filing of section 1983 conspiracy suits as plaintiffs attempt to enhance their chances of recovery.

Feinman & Cohen, Suing Judges: History and Theory, 31 S.C.L. Rev. 201 (1980).

An examination of the history of judicial immunity to determine if this reverance for the past is warranted. The authors also examine the issue on policy grounds, making a thorough review of the case law and literature. They conclude that immunity is indefensible on policy and historical grounds but do not aggressively argue for adoption of their suggested reforms.

Katz, The Quest for Qualified Judicial Immunity, 36 Mo. B.J. 376 (1980).

A basic rule of modern law is that a judge is immune from civil liability for actions within the scope of his jurisdiction, no matter how erroneous or malicious. This principle is derived from English common law and is intended to maintain the integrity and independence of our judicial system. This article examines whether this absolute privilege of immunity should be continued or whether a form of qualified immunity is more desirable.

Note, Liability of a Private Coconspirator Under 42 U.S.C. § 1983 When Acting in Conspiracy With An Immune State Judge, 33 Okla. L. Rev. 824 (1980).

This note discusses the validity of extending immunity to private individuals who act in conspiracy with an immune state judge to violate a person's constitutional rights. Specifically, it considers whether the immunity accorded a state judge should extend to his coconspirators in an action based on § 1983.

Note, Stump v. Sparkman: The Scope of Judicial and Derivative Immunities under 42 U.S.C. § 1983, 6 Women's Rts. L. Rep. 107 (1980).

This note argues that policy considerations do not support further expansion of judicial and derivative immunity. Defendants reach an understanding with a judge to violate another's constitutional rights should not be lightly excluded from liability on the strength of unexamined dictum which is being rejected by the circuit courts.

Note, The Abolition of the Doctrine of Derivative Immunity in the Fifth Circuit: Sparks v. Duval County Ranch Co., 32 Ala. L. Rev. 251 (1980).

The author traces the development of the doctrines of judicial and derivative immunity in the federal courts. More recent cases showing a shift in judicial opinion with respect to derivative immunity are discussed, including the Sparks decision which abolished the doctrine previously established in the Fifth Circuit. The author concludes that although the change in treatment of derivative immunity is encouraging, whether the doctrine will eventually be completely discredited is uncertain.

Note, The Abrogation of Derivative Immunity, 17 Hous. L. Rev. 399 (1980).

The author discusses the Fifth Circuit decision, Sparks v. Duval County Ranch Co., 604 F.2d 976 (5th Cir. 1979), that a state judge's co-conspirators are liable for damages under the Civil Rights Act of 1871, regardless of possible judicial immunity.

Note, Immunity Under § 1983: A Benefit to the Public?, 12 Conn. L. Rev. 116 (1979).

In analyzing Sparks v. Duval County Ranch Co., 588 F.2d 124 (5th Cir. 1979), this note discusses the validity of the court's affording a defendant state judge an unqualified immunity where criminal allegations had been raised against the judge. The court's strict adherence to vicarious immunity in § 1983 actions is also considered in light of decisions from other circuits rejecting this rule.

Note, Judicial Immunity -- Absolute Immunity Reaffirmed in Stump v. Sparkman, 27 U. Kan. L. Rev. 518 (1979).

This note analyzes the decision in Stump v. Sparkman with emphasis on the explications of the judicial act and jurisdictional requirements and evaluates Stump in light of the policy underpinnings of the judicial immunity doctrine.

Note, State Court Judge Has Absolute Immunity in § 1983 Action, 1979 Wash. U.L.Q. 288.

A note on Stump v. Sparkman which concludes that while the decision may lend impetus to the calls for extending only qualified immunity to judges, it precludes the possibility that the Supreme Court will actually take such action.

Comment, Judicial Act and Jurisdiction Broadly Defined, 62 Marq. L. Rev. 112 (1978).

An examination of Stump v. Sparkman in light of the historical context of two exceptions to judicial immunity: 1) acts that cannot be characterized as judicial acts, and 2) acts done in the clear absence of any jurisdiction.

Comment, Judicial Immunity: An Unqualified Sanction of Tyranny from the Bench?, 30 U. Fla. L. Rev. 810 (1978).

Comment on Stump v. Sparkman in which the author argues that the Supreme Court's analysis of the purpose of judicial immunity focused solely on the need to protect judges from malicious lawsuits, without considering the extent to which an individual's rights were circumscribed or whether an appeal was effectively foreclosed. According to the author, if the Court had balanced individual constitutional rights against the adverse effects of judicial liability, the result need not have been in favor of judicial immunity.

Comment, Judicial Immunity -- Courts of General Jurisdiction, 18 Washburn L.J. 158 (1978).

The author contends that the continuation of common-law immunity is of the highest importance. Judges should be guided by the constitution's due process guarantee, and an awareness that judicial immunity may reach out as an offensive weapon to do irreversible harm to those in whose interest the doctrine exists. The article argues that judges must remain sensitive to how far the veil of judicial immunity should extend.

Nagel, Judicial Immunity and Sovereignty, 6 Hastings Const. L.Q. 237 (1978).

The thesis of this discussion is that the rationales asserted by the Supreme Court in support of absolute judicial immunity do not justify the result. However, the alternative explanation of institutional self-interest does not fully explain the special status accorded the judicial function either.

Note, A Judge Can Do No Wrong: Immunity Is Extended for Lack of Specific Jurisdiction, 27 De Paul L. Rev. 1219 (1978).

After examining the evolution of the doctrine of judicial immunity, this note challenges the Supreme Court's application of the doctrine in Stump v. Sparkman. The author calls for a more rational immunity standard -- one under which society's interest in an efficient judiciary can be maintained while awarding damages when situations similar to Stump arise.

Note, Judicial Immunity: A Sword for the Malicious or a Shield for the Conscientious?, 8 U. Balt. L. Rev. 141 (1978).

An analysis of the Supreme Court's decision in Stump v. Sparkman. The author criticizes the Court for expanding judicial immunity and allowing the injuries which some persons will inevitably suffer at the hands of unscrupulous judges to go unremedied in order to allow all judges to be free from personal liability.

Note, Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability, 20 Ariz. L. Rev. 549 (1978).

This note examines the doctrine of absolute judicial immunity, including its history and exceptions, and discusses the most recent Supreme Court decisions on the subject. After analyzing the arguments supporting judicial immunity, the author offers a proposal that judges be granted only a qualified immunity so tort law can function to discipline the errant judge and compensate the injured.

Rosenberg, Stump v. Sparkman: The Doctrine of Judicial Immunity, 64 Va. L. Rev. 833 (1978).

This article discusses the issue of judicial immunity from suit, focusing on how the Supreme Court reached its decision in Stump v. Sparkman. The test that was articulated by the Court is discussed, as are the Court's expansive interpretations of subject matter jurisdiction and judicial acts. The decision is severely criticized, because the author feels it is a possible invitation to judicial lawlessness in the case of the vary judges who might be deterred from misconduct if the doctrine were less than all-embracing.

Kenyon, Judicial Immunity -- Who Will Defend the Judges?, 19 N.H. B.J. 93 (1977).

An examination of recent decisions under 42 U.S.C. § 1983 which have drawn important distinctions between administrative and judicial acts and their relationship to the public policy questions which underlie the doctrine of judicial immunity.

Note, Immunity of Federal and State Judges from Civil Suit - Time for a Qualified Immunity, 27 Case W. Res. L. Rev. 727 (1977).

The author reviews the doctrine of absolute judicial immunity and criticizes the policy considerations supporting total immunity. The civil law systems of judicial immunity in several foreign countries are described, as well as the qualified immunity granted other governmental officials here in the United States. The author argues in support of adopting a qualified immunity for federal and state judges.

Note, Quasi-Judicial Immunity: Its Scope and Limitations in Section 1983 Actions, 1976 Duke L.J. 95.

The author examines the scope of immunity for "quasi-judicial officers" (prosecuting attorneys, clerks of court, parole board members, and prison officials) and attempts to illustrate how the Supreme Court decision in Scheuer v. Rhodes, 416 U.S. 232 (1974), redefined the scope of immunity for such officials by holding that even the highest executive officials of a state were protected, not by absolute immunity, but by a qualified immunity in section 1983 suits.

Judge, Scherott & Bliss, Judicial Immunity Under the Civil Rights Act: Here Come the Judges' Defenses, 7 J. Mar. J. Prac. & Proc. 213 (1974).

In light of the fact that the number of civil rights actions being filed against various members of the judiciary are on the rise, this article examines the defenses which are available to judicial and quasi-judicial officers in civil rights actions.

MUNICIPALITIES

Note, Municipal Tort Immunity in Virginia, 68 Va. L. Rev. 639 (1982).

This note discusses the developments of municipal immunity in common law and the application of the doctrine in Virginia. It examines the arguments supporting municipal immunity and the allocative nature of the doctrine. The author concludes that municipal immunity is not justified, and that a rule of liability would encourage more efficient decision-making.

Note, Taking the Chartered Route Around Municipal Immunity, 41 Md. L. Rev. 316 (1982).

An examination of the recent trend in court decisions arguing that insulating municipalities from tort liability unjustly renders a tort victim remediless. In reviewing two companion cases, James v. Prince George's County, and Dawson v. Prince George's County, 288 Md. 315, 418 A.2d 1173 (1980) the author illustrates the way in which Maryland's municipalities have struck a delicate balance between municipal immunity and tort victims' interests.

Note, Municipal Immunity: Developments Since Jackson v. City of Florence, 5 Am. J. Tr. Adv. 115 (1981).

A discussion of Jackson v. City of Florence, 320 So. 2d 68 (Ala. 1975) in which the Alabama Supreme Court abolished the doctrine of municipal immunity. The court recognized that the legislature has the power to provide any protections to municipalities it deems necessary. The focus of this note is the legislature's reaction to the court's observation.

Comment, Governmental Immunity Restricted for Municipalities, 18 Washburn L.J. 182 (1978).

An historical examination of municipal immunity in Kansas leading to the Kansas Supreme Court's decision in Gorrell v. City of Parsons, 223 Kan. 645, 576 P.2d 616 (1978) abolishing municipal immunity from tort liability.

Comment, California Governmental Immunity from Malicious Prosecution Liability: "There Oughta Be A Law", 17 Santa Clara L. Rev. 429 (1977).

This comment discusses the policy, illustrated by Collins v. City & County of San Francisco, 50 Cal. App. 3d 671, 123 Cal. Rptr. 525 (1975), of shielding governmental entities from liability for malicious prosecution. It also reviews the major California cases and the pertinent provisions of the 1963 Tort Claims Act (Cal. Govt. Code § 810 (West 1966)) which codified the law in this area.

Note, Board of Commissioners of the Port of New Orleans and Other Such Boards and Agencies are no Longer Immune From Suit in Tort. Board of Commissioners v. Splendour S. & E. Co., 273 So. 2d 19 (La. 1973), 23 Cath. U.L. Rev. 181 (1973).

The author discusses the Louisana Supreme Court decision overruling prior decisions by holding that the Dock Board of the Port of New Orleans is not immune to suit. The history of the immunity doctrine in Louisana courts is reviewed, as is the state constitution's provision authorizing the legislature to provide for suits against the state. Although the author views the court's decision as based on public policy considerations rather than substantive aspects of law and precedent, it is a decision he supports.

Comment, Case for the Abrogation of Municipal Tort Immunity in Mississippi, 41 Miss. L.J. 289 (1970).

The writers attempt to show the patent fallacy of the judiciary blindly labelling municipal corporate functions as either "governmental" or "private" as a condition precedent for adjudicating lawsuits involving municipal tort immunity. They contend that this antiquated rationale should be replaced with a modern outlook, i.e., a public policy favoring recovery for all municipal torts.

Note, Municipal Tort Liability in North Dakota, 46 N.D.L. Rev. 83 (1969).

The purpose of this note is to examine municipal tort liability in North Dakota; to determine the direction the courts appear to be headed; and, to present conclusions and recommendations. The writer attempts to reflect the North Dakota case law against Chapter 40-42 of the North Dakota Century Code, the primary section on tort liability.

Sease, Iowa Municipal Tort Immunity, 16 Drake L. Rev. 35 (1966).

A review of recent Iowa cases involving governmental immunity. The writer analyzes the present status of municipal immunity, and concludes that because it cannot be predicted whether the doctrine will apply in many circumstances, it should be abandoned.

Vanlandingham, Local Government Immunity Re-Examined, 61 Nw. U.L. Rev. 237 (1966).

The author reviews a series of decisions by various states' supreme courts abrogating or modifying the common-law doctrine of local governmental immunity from torts due to negligence. The historical development of sovereign immunity is traced from its English roots, with particular attention to judicial efforts to modify immunity and the problems this has raised. The author argues that because state legislatures have for the most part neglected their obligation to act, state courts have to deal with an issue that has become archaic and unjust.

Baum, Tort Liability of Local Governments and their Employees: An Introduction to the Illionis Immunity Act, 1966 U. Ill. L.F. 981.

This article is intended to serve as an introduction to the Illinois Local Governmental and Governmental Employees Tort Immunity Act (Ill. Rev. Stat. Ch. 85 §§ 1-101 to 10-101 (1965)), touching on its background, the basic immunities it establishes and the policies upon which they rest. The author discusses some of the questions raised by the Act's numerous and sometimes complex provisions.

Fleming, The Abolishment of Municipal Immunity in Wisconsin, 23 Gavel 8 (1962).

This article discusses the impact of Holytz v. Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1960) on Wisconsin municipalities. This decisions, and others like it, emphasize the need for legislative action to establish a ceiling upon the amount of damages recoverable in tort claims, and additionally, to create a statue of limitations upon such actions.

Michigan No Longer Recognizes the Doctrine of Governmental Immunity As Applied to Municipalities, 8 How. L.J. 58 (1962).

A discussion of Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961) in which the writer contends the court's decision is sufficiently broad to encompass the abolition of immunity of all governmental bodies thus putting Michigan in the trend toward municipal responsibility for ordinary torts.

Note, Local Government Immunity From Tort Liability Removed, 10 U. Kan. L. Rev. 610 (1962).

A discussion of Muskopf v. Corning Hospital District, 11 Cal. Rptr. 89, 359 P.2d 457 (1961), in which the writer compares that decision with Kansas cases involving municipal liability.

Halperin v. Kissinger: The D.C. Circuit Rejects Presidential Immunity From Damage Actions, 26 Loy. L. Rev. 144 (1980).

Casenote on Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979) in which the author suggests that the problem of presidential immunity might best be solved if Congress amended the Federal Tort Claims Act. This amendment would delete the immunity currently granted to the federal government for acts of its officials and employees, and would allow the government to recoup damages due to their actions.

Note, Presidential Immunity From Constitutional Damage Liability, 60 B.U.L. Rev. 879 (1980).

This note argues that the qualified immunity doctrine should not apply to the President; rather, he should continue to enjoy absolute immunity from damage liability. The author reviews traditional and current immunity doctrines and suggests that the current law reflects a preference for inherent systematic checks on unconstitutional conduct.

Comment, Executive Privilege and the Congress: Perspectives and Recommendations, 23 De Paul L. Rev. 692 (1978).

This comment analyzes the statutory authority and constitutional theory behind the doctrine of executive privilege. The author attempts to demonstrate that there is no solid basis for its existence; furthermore, its unsupported assertions have relegated Congress to a role of executive "caddy" in the legislative process, resulting in the growing cynicism of the American people toward their government.

Demonstration that Documents Were Arguably Relevant and Likely to Lead to Admissible Evidence Was Sufficient to Overcome a Presumption that Presidential Communications are Privileged from Discovery in Civil Cases -- Sun Oil Co. v. United States, 514 F.2d 1020 (Ct. Cl. 1975), 44 Geo. Wash. L. Rev. 816 (1976).

Discussion of executive privilege and how it affects the discovery process. The author concludes that the Court of Claims properly held that the presidential privilege of confidentiality cannot be absolute in civil litigation, yet the fact that the court allowed this privilege to be overcome merely by plaintiff's argument of relevancy could result in the effective extinction of presidential privilege in civil discovery. It is suggested that the court should have been more consistent with the Supreme Court's decision in United States v. Nixon, 418 U.S. 683 (1974), so as to preserve the vitality of executive privilege.

Note, Executive Privilege: Myths and Realities, 8 Sw. U.L. Rev. 931 (1976).

An historical examination of executive privilege with respect to United States v. Nixon, in which the author attempts to give a precise and rigorous definition of this concept. He clearly demonstrates that executive privilege is not a myth but a privilege which in fact does exist.

Hager, The Constitution, the Court and the Coverup: Reflections on United States v. Nixon, 29 Okla. L. Rev. 591 (1976).

An examination of the events surrounding the Supreme Court's holding in United States v. Nixon -- how the case arose and what it decided. The effect of Nixon on the constitutional process, judicial review, and government secrecy is also discussed.

Owens, The Establishment of a Doctrine: Executive Privilege After United States v. Nixon, 4 Tex. So. U.L. Rev. 22 (1976).

This article focuses on the judicial treatment of a claim of executive privilege and two questions which arise upon the making of such a claim: 1) Whether there is any such privilege recognized by the courts under the circumstances of a particular case. 2) What are the parameters of the privilege?

Rhodes, From Burr to Nixon, 35 Fed. B.J. 218 (1976).

An historical discussion of executive privilege comparing the rationale of the Supreme Court decision in United States v. Nixon with John Marshall's arguments in United States v. Aaron Burr, 25 Fed. Cas. 187 (No. 14,694) (D. Va. 1807).

Berger, Executive Privilege: A Reply to Professor Sofafer, 75 Colum. L. Rev. 603 (1975).

Berger's rebuttal to Professor Sofafer's review of his book Executive Privilege: A Constitutional Myth (1974). Mr. Berger concedes that criticism plays a necessary role in testing the truth of a scholarly work but feels that the critic must himself be above reproach. He submits that Professor Sofafer has failed in this task.

Berger, Executive Privilege in Light of United States v. Nixon, 9 Loy. L.A.L. Rev. 20 (1975).

An historical look at the doctrine of executive privilege as it applies in United States v. Nixon. This discussion is based on the author's extensive research of the doctrine as originally treated by the authors of the Constitution.

Berger, Executive Privilege, Professor Rosenblum, and the Higher Criticism, 1975 Duke L.J. 921.

Berger's rebuttal to Professor Rosenblum's review of his book, Executive Privilege: A Constitutional Myth (1974) in which Berger concluded that executive privilege does not have a constitutional basis. Berger criticizes the review for its blatant disregard of the historical facts which led to his conclusions.

Clark, Book Review, Executive Privilege: A Review of Berger, 8 Akron L. Rev. 324 (1975).

A review of Raoul Berger's Executive Privilege: A Constitutional Myth (1974), in which the reviewer disagrees with Berger's central position, while hailing the work as a monument to scholarly research.

Comment, Executive Privileges: What Are the Limits?, 54 Or. L. Rev. 81 (1975).

This comment probes the meaning of executive privilege, sorting out the privileges which comprise it and identifying the source and scope of each. The author supports the theory that with careful attention to certain distinctions, a clear identification of legal issues is presented when executive privilege is claimed.

Danielson, Presidential Immunity From Criminal Prosecution, 63 Geo. L.J. 1065 (1975).

An examination of the question whether the President is immune from criminal prosecution while in office. The author concludes that although the Constitution expressly grants limited privilege from arrest to Senators and Representatives, it confers no similar privilege on the President. Historical data provided by the author suggest that the framers of the Constitution considered such a provision and rejected it.

Elles, Comments on Executive Privilege in Light of United States v. Nixon, 9 Loy. L.A.L. Rev. 33 (1975).

A response to Raoul Berger's discussion of executive privilege in which the author objects to what he sees as Berger's preoccupation with original intent. The author's first complaint concerns the theoretical and practical implications. The second concerns the difficulties involved on determining with accuracy and clarity the original intent of the authors of the Constitution.

Rotunda, Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote, 1975 U. Ill. L.F. 1.

This article does not attempt to set out all circumstances under which a former or sitting President may be compelled to give evidence before a judicial or congressional body. Rather, by using specific historical examples, the author attempts to demonstrate that arguments asserting that compelled testimony will cause the downfall of our political system are groundless.

Albert & Simon, Enforcing Subpoenas Against the President: A Question of Mr. Jaworski's Authority, 74 Colum. L. Rev. 544 (1974).

An analysis of two questions raised by Mr. Jaworski's need for additional information and President Nixon's reliance on executive privilege in resisting the subpoena. The questions are: 1) Whether Mr. Jaworski's competency to represent the U.S. against the President is properly conferred by law, and, if so, 2) whether such a law is constitutional.

Berger, The Incarnation of Executive Privilege, 22 UCLA L. Rev. 4 (1974).

This article attempts to analyze the struggle between the judiciary and the executive over which is the final arbiter of the limits of presidential privilege as encompassed in United States v. Nixon.

Comment, Executive Privilege to Withhold Information From Congress: Constitutional or Political Doctrine, 42 UMKC L. Rev. 374 (1974).

This article attempts to refute the claim that there is an absolute, unchecked executive privilege to withhold information from Congress, and to demonstrate that executive privilege is necessarily limited and its exercise must be subject to judicial review in order to prevent abuse.

Comment, Great Cases and Soft Law: A Comment on United States v. Nixon, 22 UCLA L. Rev. 76 (1974).

A comment on United States v. Nixon, analyzing the decision's significance as precedent against the background of the unusual events of Watergate. The author suggests that perhaps the Supreme Court should not have heard the case at all, and left the outcome to our political system, i.e., the two other branches of government.

Comment, United States v. Nixon and the FOIA: New Impetus for Agency Disclosure, 24 Emory L.J. 405 (1974).

The main argument of this comment is that the decision in United States v. Nixon will have an important effect by increasing agency disclosure of material covered by the FOIA Exemption 5 (inter- and intra-agency communications) leaving intact Exemption 1 concerning material containing military secrets.

Ervin, Controlling "Executive Privilege", 20 Loy. L. Rev. 11 (1974).

The author discusses the issues that arose as a result of then-President Nixon's broad claim of executive privilege in the Watergate case. The problems these claims presented to Congress are described, as is a detailed argument in support of legislation that would prevent such broad claims.

Gard, Executive Privilege: A Rhyme Without Reason, 8 Ga. L. Rev. 809 (1974).

An examination of the validity of a presidential claim of executive privilege when exercised against a congressional inquiry by analyzing arguments previously used by proponents of executive privilege. After evaluation of the historical usage theory it is suggested that history does not support it. Next, the separation of powers justification is undercut by close examination of constitutional principles. Finally, the author attacks the various public policy arguments used to support the privilege.

Gunther, Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process, 22 UCLA L. Rev. 30 (1974).

Most of the attention regarding United States v. Nixon, focused on the separation of powers pertaining to judicial-executive relations. This article focuses on a less prominent dimension of this controversy: the impact of the Supreme Court's action on the relative strengths of the legislature and judiciary.

Karst & Horowitz, Presidential Prerogative and Judicial Review, 22 UCLA L. Rev. 47 (1974).

This article discusses the role of the courts in relation to presidential powers, focusing on: 1) The argument that the President is constitutionally immune from the judicial process to compel production of subpoenaed information; and 2) the argument that the President has an absolute, unreviewable, discretionary privilege to control the release of information.

Kurland, *United States v. Nixon: Who Killed Cock Robin?*, 22 UCLA L. Rev. 68 (1974).

A survey of the role of the Supreme Court in the events of Watergate. Cases reviewed are: *New York Times Co. v. United States*, 403 U.S. 713 (1971) (Pentagon Papers Case); *O'Brien v. Brown*, 409 U.S. 1 (1972), *Cousins v. Wigoda*, 409 U.S. 1201 (1972) (Democratic Convention Cases); and *United States v. Nixon*, 418 U.S. 683 (1974). According to the author, each case demonstrates the Court's role as one which was not contemplated by the authors of the Constitution.

Kutner, *Executive Privilege ... Growth of Power Over a Declining Congress*, 20 Loy. L. Rev. 33 (1974).

The author discusses his theory that the problems executive privilege have come about through the gradual erosion of the powers of Congress in conjunction with the steady growth of a powerful, centralized presidency.

Nathanson, *From Watergate to Marbury v. Madison: Some Reflections on Presidential Privilege in Current Historical Perspectives*, 16 Ariz. L. Rev. 59 (1974).

An inquiry into the question of presidential privilege, in relation to its immediate impact on the problems of Watergate, as presented in *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973), and in relation to its long-term implications for the office of the presidency and the practice of separation of powers.

Note, *Executive Privilege: Tilting the Scales in Favor of Secrecy*, 53 N.C.L. Rev. 419 (1974).

The author discusses the Supreme Court's decision in *United States v. Nixon* which held that while executive privilege is rooted in the Constitution, the courts must be the final arbiters of the scope and validity of any claim of privilege. Brief outlines of earlier Court decisions with regard to executive privilege are provided. The decision in *Nixon* is criticized for adopting a test for determining the need for disclosure that is seen as being inequitable to those seeking the release of information.

O'Brien, *The Dissenting Opinions of Nixon v. Sirica: An Argument for Executive Privilege in the White House Tapes Controversy*, 28 Sw. L.J. 373 (1974).

In this article, the author attempts to explain the legal and political foundations of the concept of executive privilege which he feels has historically been a part of our constitutional system of government.

The President Does not Have an Absolute Privilege to Withhold Evidence From a Grand Jury -- Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973), 87 Harv. L. Rev. 1557 (1974).

A discussion of Nixon v. Sirica in which the Court of Appeals rejected the President's broad claims of executive immunity and privilege. The author concludes that unlike the Burr decision, the unusual circumstances in this case -- evidence of criminal wrongdoing by Presidential advisors, the President's handling of the tapes, and his personal interest in the outcome -- provided a number of possible reasons for the court to reject the President's claims.

Sofafer, Book Review, Executive Privilege: A Constitutional Myth, 88 Harv. L. Rev. 281 (1974).

Professor Sofafer's review of Raoul Berger's book. The reviewer praises Berger's scholarship, but attacks the book as being wholly one-sided and misleading.

Note, United States v. Nixon: What Price Unanimity?, 2 Ohio N.U.L. Rev. 303 (1974).

This note attempts to answer the question: to what degree did the Supreme Court in United States v. Nixon effectively underwrite a broadened executive privilege while simultaneously declining to adopt the president's interpretation of that privilege's contours?

Note, Policing the Executive Privilege, 5 U. Mich. J.L. Ref. 568 (1972).

This note reviews the nature of the controversy which contributed to the introduction S. 1125, 92d Cong., 1st Sess. (1971) by Senator Fullbright, and examines the provisions of the bill.

Ervin, Executive Privilege: The Need for Congressional Action, 62 Ill. B.J. 66 (1973).

The author asserts that the Watergate hearings and other investigations point toward the need for a free flow of information between the executive branch and Congress. Legislation which has been introduced and would require federal officials to appear and testify when requested is discussed, with the author concluding that more than a climate of cooperation and goodwill is needed.

Berger, Executive Privilege v. Congressional Inquiry, 12 UCLA L. Rev. 1044 (1965).

A history of the century-old battle between Congress and the President over the legislature's claims of constitutional power to inquire into executive conduct and the President's claim of privilege in withholding information.

STATE & MUNICIPAL IMMUNITY UNDER THE CIVIL RIGHTS ACT

Note, Municipal Corporations are Immune From Exemplary Damages Under 42 U.S.C. § 1983, 13 Tex. Tech L. Rev. 156 (1982).

A consideration of City of Newport v. Fact Concerts, Inc., 101 S. Ct. 2748 (1981) and the Supreme Court's rationale in deciding this case based on: (1) the status of the defendant as a municipality; and (2) the presence of gross negligence or malice in the municipality's actions.

Note, Municipalities Immune From Punitive Damages Under 42 U.S.C. § 1983, 21 Washburn L.J. 379 (1982).

An historical analysis of the development of the doctrine of municipal immunity in actions brought under 42 U.S.C. § 1983. This note briefly outlines the major cases in this area and concludes that the Supreme Court's track record indicates that granting municipalities immunity from punitive damages is necessitated by public policy.

Comment, A New Perspective on Legislative Immunity in § 1983 Actions, 28 UCLA L. Rev. 1087 (1981).

This comment analyzes the Supreme Court's current approach to legislative immunity and demonstrates the Court's failure to fully consider the policies of legislative immunity and the purposes of § 1983.

Comment, Municipalities are not Immune for Constitutional Violations and Cannot Raise the Good Faith of Its Officials As A Defense, 57 N.D.L. Rev. 93 (1981).

Comment on Owen v. City of Independence, 445 U.S. 622 (1980) in which the author contends that Owen chips away at the already eroded historical concept of sovereign immunity. Owen is in keeping with current notions of governmental responsibility, that is, individuals who are harmed by abuses of governmental authority should be compensated.

Goode, The Changing Nature of Local Governmental Liability Under § 1983, 22 Urb. L. Ann. 71 (1981).

This article discusses the new rules of governmental liability, as created by a series of recent Supreme Court decisions, and their implications for future litigation. The decisions involve questions of statutory construction and as such are subject to modification by legislative action. The result of this examination is a discussion of how the rules of litigation in this area have been substantially altered.

Hutchins, Municipal Corporations are not Immune From Suit for Violations of Civil Rights Under 42 U.S.C. § 1983, 12 Tex. Tech L. Rev. 500 (1981).

A discussion of recent Supreme Court decisions regarding municipal liability under 42 U.S.C. § 1983. The author contends that although the Court has recognized that municipalities posses neither an absolute nor qualified immunity under § 1983, it still must address the scope of municipal liability.

Municipalities Held Strictly Liable Under § 1983, 59 Wash. U.L.Q. 535 (1981).

A discussion of the controversy surrounding municipal liability under § 1983 since it first arose in Monroe v. Pape, 365 U.S. 167 (1961) through the Court's more recent interpretation in Owen v. City of Independence.

Note, Owen v. City of Independence: Expanding the Scope of Municipal Liability Under § 1983, 47 Brooklyn L. Rev. 517 (1981).

This note discusses the Supreme Court's holding in Owen v. City of Independence. It begins with an historical review of the leading decisions under § 1983 and concludes that Owen clearly reflects a considered weighing of competing policies, i.e., the preservation of constitutionally protected rights versus the protection of municipal treasuries.

Note, The End of Good Faith Immunity for Municipalities Under § 1983, 15 Suffolk U.L. Rev. 130 (1981).

A discussion of the Supreme Court's rationale in imposing strict liability on a municipality for deprivation of constitutional rights in Owen v. City of Independence. The author believes that this decision could place an added financial burden on the taxpayers if the number of suits under § 1983 continues to rise.

Peters, Municipal Liability After Owen v. City of Independence and Maine v. Thiboutot, 13 Urb. Law. 407 (1981).

Because of recent Supreme Court decisions, municipalities and other local government units must exercise caution in establishing guidelines for future conduct. Municipalities should also be aware of the defenses to § 1983 suits which are still valid in light of these decisions. This article presents considerations which municipalities should keep in mind in implementing future policies.

Qualified Immunity not Extended to Municipalities Under 42 U.S.C. § 1983, 20 Washburn L.J. 618 (1981).

Using the decision in Owen v. City of Independence, the author presents an historical analysis of judicial decisions under 42 U.S.C. § 1983. She concludes that although public policy supports the right of an individual to be compensated for constitutional violations, the effects of Owen on the ability of municipalities to pay damages are very uncertain.

Freilich et al., 1979-1980 Annual Review of Local Government Law: Municipal Liability and Other Certain Uncertainties, 12 Urb. Law. 577 (1980).

A discussion of three major Supreme Court cases (Owen, Thiboutot and Maher) and the effects of each upon the immunity granted to municipalities in suits under 42 U.S.C. § 1983. The authors find it disturbing that: 1) states are protected under the eleventh amendment from retroactive damages; 2) individuals may claim immunity for good faith actions; and 3) § 1983 grants no immunity remedy against the U.S.

Carlisle, Owen v. City of Independence: Toward Constructing a Model for Municipal Liability After Monell, Pts. 1 and 2, 12 Urb. Law. 292 (1980), 12 Urb. Law. 727 (1980).

The author suggests that actions, such as Owen, seeking damages for unconstitutional conduct should be distinguished from other causes of action requesting prospective declarations as to the constitutionality of basic policy decisions. In addition, when a statute operates to provide a tort remedy for damages against a governmental defendant, all tort defenses traditionally available to its employees as individual defendants should be accorded.

Comment, Civil Rights Litigant, 42 U.S.C. § 1983, and Local Government Immunity, 33 Ark. L. Rev. 529 (1980).

A judicial history of § 1983 actions which concludes that Monell v. Department of Social Services, 436 U.S. 658 (1978), raises more issues than it decides. Does qualified immunity for local governments exist under § 1983? When do official acts represent official policy? Is a particular governmental unit to be characterized as the state or local governmental body? The writer contends that these questions can only be answered on a case-by-case basis.

Comment, Derivative Immunity: An Unjustifiable Bar to § 1983 Actions, 1980 Duke L.J. 568.

Through a discussion of the development of the doctrines of derivative immunity and its current status in the federal courts, this comment argues that a general doctrine of derivative immunity is unjustifiable. An evaluation is made of the first and fifth circuits' rejections of the doctrine and their standard of liability under § 1983. Finally, the writer proposes an alternative that would establish a sliding scale of liability for private defendants depending upon whether they acted with, or in reliance or obediance to public officials.

Comment, Derivative Immunity Under § 1983: Conspiracies Between Immune Judicial Officials and Private Persons, 14 J. Mar. L. Rev. 89 (1980).

This comment surveys the differing ways in which jurisdictions have adopted a policy of derivative immunity. The author contends that this doctrine serves the important objective of restricting access to the federal courts and review of state court decisions, but nevertheless, leaves valid federal claims unredressed.

Comment, Strict Liability Under § 1983 for Municipal Deprivations of Federal Rights? Owen v. City of Independence, 55 St. John's L. Rev. 153 (1980).

This comment examines several issues which the Supreme Court left open in its Owen decision. The author contends that a strict liability standard for municipal violations of § 1983 is not only unwarranted in light of the historical purpose of liability without fault, but is inconsistent with the realities of the municipal government system. He also argues that an alternative theory of municipal liability based on negligence has not been precluded by § 1983 precedents.

Kramer, § 1983 and Municipal Liability: Selected Issues Two Years after Monell v. Department of Social Services, 12 Urb. Law. 232 (1980).

This article focuses on three areas left untouched in dealing with the elemental parts of a cause of action under § 1983: the continued liability of a Bivens cause of action arising directly under the Constitution; the parameters of official policy, rule, custom or usage which falls under the Monell - § 1983 rubric; and finally, what impact the type of governmental unit sued has on the available relief.

Kushner, The Impact of § 1983 after Monell on Municipal Policy Formulation and Implementation, 12 Urb. Law. 466 (1980).

This article examines Monell v. Department of Social Services, as well as subsequent federal district and appellate cases with respect to their impact upon the formulation and implementation of municipal and local governmental policy. It also discusses the guidelines propounded in Monell, and followed in subsequent decisions, to determine what actions constitute a "custom or usage" that will give rise to municipal liability under § 1983.

Note, Civil Rights Suits Against State and Local Governmental Entities and Officials: Rights of Action, Immunities, and Federalism, 53 S. Cal. L. Rev. 945 (1980).

An in-depth examination of the issues in the area of suits by individuals against state and local governmental officials or entities pursuant to federal statutes in federal courts. The authors delineate the rights and options available to the parties and discuss the federal statutes that may be used to sue state and local governmental entities and officials. The defenses that may be raised in such actions, including the official immunities that have developed under § 1983 of the civil rights statutes, are also examined.

Note, Demise of Municipal Immunity Under § 1983, 14 Ga. L. Rev. 605 (1980).

An examination of Owen v. City of Independence, in which the author analyzes the issue of municipal liability under § 1983 as a conflict of two principles: compensation of individuals whose constitutional rights have been violated, and, the ability of local governments to conduct the public's business unfettered by fears of civil liability.

Note, § 1983 Liability of Private Actors Who Conspire With Immune State Officials, 80 Colum. L. Rev. 802 (1980).

After describing the elements of a § 1983 conspiracy action, this note analyzes the restrictions that some courts have placed on plaintiffs' ability to recover from private persons who conspire with immune state officials. The author determines that these restrictions are contrary to applicable case law. Finally, he examines the contention that the restrictions on recovery are necessary to prevent an onslaught of frivolous § 1983 conspiracy claims.

Note, *The Abrogation of Derivative Immunity*, 17 Hous. L. Rev. 399 (1980).

The author discusses the Fifth Circuit decision *Sparks v. Duval County Ranch Co.*, 604 F.2d 976 (5th Cir. 1979) that a state judge's coconspirators are liable for damages under the Civil Rights Act of 1871, regardless of possible judicial immunity.

Seng, *Municipal Liability for Police Misconduct*, 51 Miss. L.J. 1 (1980).

This article pursues the idea of municipal liability for the misconduct of its police officers. Three varieties of police misconduct are discussed: actions pursuant to an ordinance or policy illegal on its face; abuse of process; and police brutality. The author applies the principles developed in *Monell* and *Owen* to each situation and discusses specific problems of pleading, proof and remedies.

Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5 (1980).

In this article, the author discusses the explosion of constitutional tort suits during the period 1961-1979 by analyzing the significance of the overlap between state tort law remedies and remedies under § 1983. The author concludes that the courts' dissatisfaction with § 1983 cannot be attributed to the fact that it has been used to provide a remedy which supplements state law.

Casto, *Innovations In the Defense of Official Immunity Under § 1983*, 47 Tenn. L. Rev. 47 (1979).

This article contends that the Supreme Court has created a number of questions in its decisions with regard to immunities: What are the proper sources of law for developing a system of official immunities? To what extent has the court relied upon these sources in developing a system of official immunities? In a specific case, how does one determine whether absolute or qualified immunity is applicable?

Comment, *§ 1983, Immunity, and the Public Defender: The Misapplication of Imbler v. Pachtman*, 55 Chi.[-]Kent L. Rev. 477 (1979).

This comment examines the development of § 1983 claims against public defenders, the defense of immunity often allowed by the courts to defeat such claims, and the application by some courts of the immunity defense without first locating the requiste state action. Finally, this comment assesses the opinion in *Robinson v. Bergstrom*, 579 F.2d 401 (7th Cir. 1978).

Comment, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. Chi. L. Rev. 935 (1979).

This comment analyzes the propriety of municipal respondeat superior liability. First, it examines the reasons offered by the *Monell* Court for rejecting *respondeat superior* in § 1983 actions against municipalities. It then argues that the purpose and legislative history of the provision demand a scheme of *respondeat superior* liability. Finally, it explores the countervailing concerns of federalism, and considers their impact on such a liability scheme.

Comment, *States' Eleventh Amendment Immunity Under § 1983*, 10 Cum. L. Rev. 223 (1979).

A discussion of states' sovereign immunity cases culminating with the Supreme Court decision in *Monell v. Department of Social Services*. The author contends that certain of these decisions are difficult to reconcile with others and that the Court has recognized the power of Congress to pass a statute pursuant to the fourteenth amendment which abrogates the immunity of the eleventh amendment.

Comment, *Suing Municipalities under 42 U.S.C. § 1983: The Impact of Monell v. Department of Social Services*, 24 Vill. L. Rev. 1008 (1979).

This comment discusses the Supreme Court's holding in *Monell v. Department of Social Services* light of the legislative history of § 1983 and the relevant case law. It also explores the anticipated impact of *Monell* and the question whether the decision has provided new impetus to the Civil Rights Act of 1871.

Day & Jacobs, *Opening the Deep Pocket - Sovereign Immunity Under § 1983*, 31 Baylor L. Rev. 389 (1979).

Monetary awards against states in § 1983 actions were foreclosed by the eleventh amendment to the Constitution, and the Supreme Court decision in *Monroe v. Pape*, 365 U.S. 167 (1961) precluded municipal liability for suits brought under § 1983. This article examines recent Supreme Court decisions which have made possible the recovery of damages from municipalities under § 1983 and have eroded the states' eleventh amendment immunity.

Love, Damages: A Remedy for the Violation of Constitutional Rights, 67 Calif. L. Rev. 1242 (1979).

The author discusses the emergence of damages as a remedy for enforcement of constitutional guarantees and attempts to determine the kinds of damages that ought to be recoverable in § 1983 and Bivens actions in light of the Supreme Court decision in Carey v. Piphus, 435 U.S. 247 (1978). The author recommends judicial or legislative recogniztion of presumed compensatory damages in actions for violations of constitutional rights that protect intangible, dignitary interests.

Note, Absolute Immunity Withdrawn - Qualified Immunity Left as a Possibility, 1979 Wis. L. Rev. 943.

This note discusses the Supreme Court decision in Monell v. Department of Social Services that a municipality is subject to suit under § 1983. The author examines the general notion of qualified immunity, and surveys judicial approaches to qualified municipal immunity in civil rights suits other than damage actions under § 1983. The author concludes that the concept of qualified immunity has no place in § 1983 litigation against municipalities.

Note, Cities Liable Under § 1983: Monell v. Department of Social Services, 32 Sw. L.J. 1347 (1979).

A discussion of the Supreme Court's ruling in Monell v. Department of Social Services in which the author lauds the Court for its truly landmark decision, in that it greatly expands the availability of § 1983 relief for any citizen deprived of constitutional rights under the color of state law. It also provides plaintiffs with a wide range of financially responsible defendants.

Note, Claims Against States for Damages, 7 Fla. St. U.L. Rev. 525 (1979).

This note discusses cases giving rise to § 1983 claims for monetary relief against states, and analyzes the decisions which established standards governing judicial findings of congressional intent to abrogate the eleventh amendment. It applies those standards to the language and history of § 1983, and discusses the Supreme Court's intentions in light of the conflict betwen federalism and the interest of plaintiffs in being afforded an effective remedy.

Note, Immunity Under § 1983: A Benefit to the Public?, 12 Conn. L. Rev. 116 (1979).

In analyzing Sparks v. Duval County Ranch Co., 588 F.2d 124 (5th Cir. 1979) this note discusses the validity of the court's affording a defendant state judge an unqualified immunity where criminal allegations have been raised against the judge. The court's strict adherence to vicarious immunity in § 1983 actions is also considered in light of decisions from other circuits rejecting the rule.

Note, Legislative Abrogation of Immunities Under § 1983, 55 Notre Dame Law. 133 (1979).

This note focuses on the governmental and official immunities of § 1983 with a perspective toward their codification or change. Two issues are examined: (1) to what extent should governmental immunity be granted under § 1983, if at all; and (2) to what extent should official immunity be granted under § 1983, if at all?

Note, Local Government Liability Under 42 U.S.C. § 1983, 18 Washburn L.J. 366 (1979).

A discussion of significant federal court cases dealing with municipal liability in § 1983 actions, culminating with Monell v. Department of Social Services. The writer contends that the Supreme Court has removed a major stumbling block for those who seek recovery from a municipality; however, municipal immunity will continue to bar actions based upon respondeat superior.

Note, Local Governmental Entities No Longer Absolutely Immune Under § 1983, 28 De Paul L. Rev. 429 (1979).

This note examines the problems created by Monroe v. Pape and its successors. It also discusses the Monell v. Department of Social Services opinion and its impact on three key areas: the approaches taken by the lower federal courts in which section 1983 actions involved local governmental entities; the status of school boards vis-a-vis municipal corporations in § 1983 suits; and the general posture assumed by the Supreme Court with regard to civil rights litigation.

Note, Monell v. Department of Social Services: A Supreme Court Adoption of Lower Court Exceptions, 1979 Utah L. Rev. 251.

This note traces the compelling policy arguments voiced in the lower federal courts which facilitated the circumvention of municipal immunity long before the Supreme Court's decision in Monell v. Department of Social Services. From this perspective, Monell's significance disappears and the case becomes a final eulogy for the once invincible municipal immunity doctrine.

Note, Monell v. Department of Social Services: One Step Forward and a Half Step Back for Municipal Liability Under § 1983, 7 Hofstra L. Rev. 893 (1979).

This note traces the background of municipal liability under § 1983 through the Supreme Court decision in Monell v. Department of Social Services. It concludes that the holding in Monell excluding respondeat superior as a source of liability under the statute is not justified by either the legislative history relied on by the Court or general principles of statutory construction.

Note, Monell v. Department of Social Services: The Court Compromises on Municipal Liability Under § 1983, 57 N.C.L. Rev. 459 (1979).

An evaluation of Monell v. Department of Social Services as a compromise between two extremes - the total municipal immunity of Monroe v. Pape on the one hand, and full municipal liability on the other.

Note, Municipal Corporations Will no Longer Have Absolute Immunity From Claims for Violations of Constitutional And Federal Rights, 56 U. Det. J. Urb. L. 691 (1979).

An examination of the Monell v. Department of Social Services decision suggesting that it will become the basis for an increase in the number of suits under § 1983, which in turn would increase the operating budgets of municipalities. The conclusion is drawn that in the long run this cost will be borne by the taxpayer.

Note, Municipal Liability for § 1983 Actions, 10 U. Tol. L. Rev. 519 (1979).

This note attempts to explain the Supreme Court's change of position from Monroe v. Pape in Monell v. Department of Social Services. The author first reviews the doctrine of municipal immunity as established in Monroe, followed by a discussion of the Monell Court's reasoning for its departure from Monroe. Finally, she discusses the difficulties that can arise in the interpretation and application of a Monell-type doctrine.

Note, Municipal Liability Under § 1983: The Meaning of "Policy or Custom", 79 Colum. L. Rev. 304 (1979).

This note seeks to define the duty of local governments under the twin criteria of "policy" or "custom" by reexamining the legislative history of § 1983. First, it briefly describes the holding in Monell v. Department of Social Services and examines questions left open by the Supreme Court. Second, it establishes that the duty Congress meant to impose covers a wide range of official actions. Finally, it suggests a model of municipal liability under standards developed from the legislative history.

Note, New Liability for Land Use Regulators in Ohio - The Limits of Regulatory Power, 28 Clev. St. L. Rev. 283 (1979).

This article concentrates on the significance of Monell v. Department of Social Services to local governments in Ohio. Monell has forced local governments to pay particular attention to the specific limitations on their powers to regulate. Significant financial liability may be imposed if these bodies exceed their authority and deprive an individual of a constitutionally protected right.

Note, The Status of Official and Municipal Immunity From Damage Actions Under 42 U.S.C. § 1983, 14 Land & Water L. Rev. 281 (1979).

This note briefly examines the effect of the Supreme Court's decision in Monell v. Department of Social Services upon official immunity. It then considers the issues of where the lines of municipal liability should be drawn, and whether residual municipal immunity has survived.

Schnapper, Civil Rights Litigation After Monell, 79 Colum. L. Rev. 213 (1979).

This article outlines the issues that must be dealt with after Monell v. Department of Social Services: (1) rules and practices which are "official acts, policies and customs" subjecting a government to suit under Monell, (2) possible defenses available to a city, and (3) scope of relief available on § 1983 actions against state officials. The author urges that claims arising under state laws be tried in federal court when joined with § 1983 claims.

Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harv. L. Rev. 610 (1979).

This article examines the growth of prisoner civil rights suits and takes a close look at how these suits are handled in a number of different states. The author makes various recommendations that he feels will reduce the number of frivolous suits, and improve the ability of the courts to identify the meritorious cases and fairly adjudicate them.

Comment, Cities as Persons Under 42 U.S.C. § 1983, 10 N.C. Cent. L.J. 115 (1978).

A review of Monell v. Department of Social Services inquiring into the factors that led to the abandonment of the "nonperson" rule after nearly two decades of reaffirmance. The comment also discusses the situations in which a city can be held accountable for violations of civil rights as opposed to those where the city still enjoys an immunity under § 1983.

Comment, Civil Rights: Discarding § 1983 Municipal Immunity - Is That Enough?, 30 U. Fla. L. Rev. 979 (1978).

This comment argues that the Supreme Court's holding in Monell v. Department of Social Services will not open the floodgates of § 1983 litigation against municipalities. Rather, it has merely legitimatized a course already followed by most lower courts - the official capacity device used to allow individuals to attack an allegedly unconstitutional policy. The Court has recognized the validity of these suits, allowing the true defendant, the city, to be sued.

Comment, Municipal Immunity No Longer a Bar to 42 U.S.C. § 1983 Suits?, 24 Loy. L. Rev. 761 (1978).

A review of recent civil rights suits involving the doctrine of municipal immuity, specifically focusing on Monell v. Department of Social Services. The writer concludes that repercussions of this decision cannot be foreseen until the Supreme Court defines the issues of "custom" and "usage" and until the existence of qualified immunities is established for municipalities.

Comment, "Vicarious Immunity" of Private Persons in § 1983 Actions: "An Unexplained Assumption", 28 Case W. Res. L. Rev. 1014 (1978).

In most federal circuits, when all the "state" defendants in an action under 42 U.S.C. § 1983 are accorded immunity, so are any private defendants who have allegedly acted in concert with them. After tracing the evolution of this doctrine of "vicarious immunity" and weighing the arguments for and against it, the author proposes the rejection of the doctrine and adoption of a subjective and objective good faith standard for private § 1983 defendants alleged to have acted in concert with state officials.

Nahmod, Persons Who Are Not "Persons": Absolute Individual Immunity Under § 1983, 28 De Paul L. Rev. 1 (1978).

In this article, the author examines the issue of absolute immunity under § 1983. He explores the doctrine's history, the distinction between actions for damages and injunctions, and projects the doctrine's effect on certain individuals in the future.

Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers Misconduct, 87 Yale L.J. 447 (1978).

According to the author, the private suit for civil damages is the most promising weapon in the battle to restrain official misconduct; however, because of statutory limitations and appellate court decisions, it suffers from serious shortcomings. Among other possible remedies, the author suggests that the U.S. be permitted to intervene as a plaintiff in § 1983 suits and to initiate suits for the benefit of the victim. Another suggested change is to allow suits directly against the defendant's employing department. In connection with this idea, the author argues that where the liability is placed on the wrongdoer's employer, the good faith and immunity from suit defenses should be abolished.

Note, Governmental Liability Under § 1983 and the Fourteenth Amendment After Monell, 66 St. John's L. Rev. 66 (1978).

This note first reviews judicial interpretation of the scope of § 1983 with respect to the question of municipal liability. It is suggested that the Supreme Court's decision in Monell v. Department of Social Services including municipalities as persons for purposes of § 1983 will foreclose resort to a constitutionally derived remedy. Finally, the author contends that Monell will terminate the absolute immunity from § 1983 liability that has been accorded state governments.

Note, The Emergence of Municipal Liability Under 42 U.S.C. § 1983, 8 Cap. U.L. Rev. 103 (1978).

This note discusses the major Supreme Court decisions between Monroe v. Pape and Monell v. Department of Social Services with regard to their attempts to establish municipal liability under § 1983 and highlights the major factors in the Court's decision to impose liability on municipalities.

Theis, Official Immunity and the Civil Rights Act, 38 La. L. Rev. 281 (1978).

This article outlines two approaches to determining the proper scope of immunity for government officers under § 1983 and argues for the superiority of one over the other. The author assesses the Supreme Court's most recent decisions within this framework and states that their incoherence is the most damaging objection to them.

Walston, Local Governments Can Be Directly Sued Under 42 U.S.C. § 1983 Where Unconstitutional Action Is Pursuant to Governmental Custom or Impliments Official Policy, 10 Tex. Tech L. Rev. 145 (1978).

An analysis of judicial developments with regard to immunities culminating with Monell v. Department of Social Services. The writer discusses arguments for and against municipal immunity within the context of Monell and concludes that the decision merely establishes the outer limits of § 1983 municipal liability.

Comment, Liability of State Supervisory Officials Under § 1983, 22 S.D.L. Rev. 369 (1977).

This comment examines the liability of state governmental bodies under § 1983. It expands this discussion to include the possible theories of recovery under § 1983 against such governmental bodies and supervisors accused of violating an individual's constitutional rights.

Comment, Official Immunity from Damages in § 1983 Suits: Wood v. Strickland, 56 Or. L. Rev. 124 (1977).

A comment on Wood v. Strickland, 420 U.S. 308 (1975) reviewing developments leading to the formulation of the Strickland standard of qualified immunity. The author discusses changes from previous case law, and suggests several factors to be considered in applying the standard.

Kenyon, Judicial Immunity -- Who Will Defend the Judges?, 19 N.H.B.J. 93 (1977).

An examination of recent decisions under 42 U.S.C. § 1983 which have drawn important distinctions between administrative and judicial acts and their relationship to the public policy questions which underlie the doctrine of judicial immunity.

Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions, 30 Vand. L. Rev. 941 (1977).

This article reviews the Supreme Court's decision in Wood v. Strickland, 420 U.S. 308 (1975) and attempts to examine the relationship in constitutional tort actions between the various defenses and immunities and the prima facie case. The author suggests solutions to the difficulties the courts have encountered in determining the scope of immunities and burdens of proof.

Levin, The Section 1983 Municipal Immunity Doctrine, 65 Geo. L.J. 1 483 (1977).

Since Monroe v. Pape, federal courts have struggled with municipal immunity as enunciated in that decision. The author proposes that in actions brought under 42 U.S.C. § 1983 municipalities should be immune from vicarious liability, but liable for unconstitutional policies, regardless of the relief being sought.

Note, Developments In the Law -- § 1983 and Federalism, 90 Harv. L. Rev. 1,133 (1977).

This note examines the enforcement of constitutional rights under § 1983 in light of the enhanced contemporary concern with state autonomy and integrity. The author discusses the ramifications of the concern with states' interests in § 1983 actions and attempts to give some content to the vague contours of Federalism.

Note, Implying a Damage Remedy Against Municipalities Directly Under the Fourteenth Amendment: Congressional Action as an Obstacle to Extension of the Bivens Doctrine, 36 Md. L. Rev. 123 (1977).

The author examines the Supreme Court's decision in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), and discusses the reasoning and the principles that the decision embodies. The applicability of Bivens principles to other constitutional provisions is considered, as well as the question of municipalities' liability under the fourteenth amendment. The author argues that exclusion of municipalities from the coverage of 42 U.S.C. § 1983 constitutes a congressional determination that, on balance, makes judicial recognition of an independent damage remedy ill-advised.

Note, Municipal Liability Under § 1981, 66 Geo. L.J. 143 (1977).

A survey of cases involving § 1981 municipal liability in which the writer looks at the scope of protection afforded by § 1981 of the Civil Rights Act and considers the statute's language, legislative history and purpose. This leads to his conclusion that the extention of § 1981 liability to municipalities is justified.

Note, Reputation, Stigma and Section 1983: The Lessons of Paul v. Davis, 30 Stan. L. Rev. 191 (1977).

This note analyzes the development of § 1983 interpretations and the Supreme Court's failures to define appropriate limiting standards. The author proposes a standard for limiting defamation actions under § 1983 that he argues is doctrinally sound and more protective of fourteenth amendments rights than is the standard in Paul v. Davis, 424 U.S. 693 (1976).

Note, Suit Against Municipal Board of Trustees and Its Individual Members for Declaratory and Injunctive Relief and for Damages Not Maintainable Under § 1983, 55 Tex. L. Rev. 501 (1977).

A review of the section 1983 cases which allowed the court in Muzquiz v. City of San Antonio, 528 F.2d 499 (5th Cir. 1976) to confront the two central issues in that case: (1) how to define the term "person" under § 1983, and (2) how to apply the party-in-fact doctrine.

Note, Wood v. Strickland and the Burden of Proving "Good Faith" in a Student's § 1983 Damages Action, 15 J. Fam. L. 679 (1977).

This note addresses a two-fold question: given a student's § 1983 damages action against a school official for a violation of a constitutional right, is the burden on the student to prove the official's bad faith an essential element of his action or is the "good faith" defense an affirmative one, in which case the burden would be on the defendant to show that his actions were in good faith?

Comment, Accountability for Government Immunity: Limiting Qualified Immunity and the Good Faith Defense, 49 Temp L.Q. 938 (1976).

The author focuses on the civil damages remedy for official deprivations of constitutional rights, specifically exploring the conflict between the protections afforded by the Bill of Rights and § 1983, and the policies underlying the doctrine of official immunity. A number of police misconduct cases are examined and the implications of their holdings discussed. The author calls for rejection of the standard adopted by the Supreme Court in Bivens, because he feels the use of a lesser standard (good faith and reasonable belief) in civil cases than in criminal cases has created a dichotomy in the thrust of the fourth amendment.

Comment, § 1983 and The New Supreme Court: Cutting the Civil Rights Act Down to Size, 15 Duq. L. Rev. 49 (1976).

The purpose of this comment is to examine recent decisions and their effect on § 1983 litigation in order to determine whether they jeopardize the usefulness of § 1983 as a statute capable of redressing constitutional rights.

Comment, § 1983, The Eleventh Amendment, and General Principles of Tort Immunities and Defenses: Who is Left to Sue?, 45 UMKC L. Rev. 29 (1976).

This comment attempts to explore the problems faced by the Supreme Court in dealing with cases arising under 42 U.S.C. § 1983. These include the concepts of sovereign immunity; official immunity; congressional intent as to the scope of the word "person" as used in the statute; the amenability to federal suit of states and their subdivisions; and the effect of the eleventh amendment on all of these aspects.

McCormack & Kirkpatrick, Immunities of State Officials Under Section 1983, 8 Rut.-Cam. L. Rev. 65 (1976).

A discussion of the Supreme Court's adoption of a policy holding that § 1983 does not abrogate the traditional absolute immunity of legislators, nor does it prevent public officials from claiming a form of "qualified immunity." The author argues that this policy has led to a wide range of immunity claims from state officials, thus opening the door to the complexities of a sliding scale of official immunity under § 1983.

Note, Quasi-Judicial Immunity: Its Scope and Limitations in § 1983 Actions, 1976 Duke L.J. 95.

The author examines the scope of immunity for "quasi-judicial officers" (prosecuting attorneys, clerks of court, parole board members, and prison officials) and attempts to show how the Supreme Court decision in Scheuer v. Rhodes, 416 U.S. 232 (1974), redefined the scope of immunity for such officials.

Note, Second Guessing the Court: Ex Post Facto Liability Under 42 U.S.C. § 1983, 28 Baylor L. Rev. 339 (1976).

An analysis of Wood v. Strictland, and O'Connor v. Donaldson, 422 U.S. 563 (1975) in which the Supreme Court formulated new criteria for determining whether the conduct of state officers is violative of § 1983. The author discusses the standard used in Wood, the apprehensions prompted by the decision, and the fulfillment of those apprehensions in O'Connor.

Note, The Status of Public Officials as Persons Under 42 U.S.C. § 1983, 54 N.C.L. Rev. 1062 (1976).

A casenote on Burt v. Board of Trustees of Edgefield County School District, 521 F.2d 1,201 (4th Cir. 1975), evaluating the Fourth Circuit's rationale through a brief history of municipal liability under § 1983, and a discussion of congressional intent as to the extent governmental units are to be considered "persons" under that § 1983 of the Civil Rights Act.

Note, Wood v. Strickland: Liability of School Board Members For Damages Resulting From Deprivation of a Student's Civil Rights, 13 Cal. W.L. Rev. 153 (1976).

An examination of Wood v. Strickland and its effect on the immunity held by school board members. The author compares the school officials' immunity, against the background of the board members' duties and the mechanics of the school system, to the immunity traditionally recognized for other government officials. From this analysis, a different standard of immunity is suggested, one which would broaden the protection from monetary damages offered to school officials.

Stern, Wood v. Strickland: The Aftermath, 8 Urb. Law. 885 (1976).

A discussion of Wood v. Strickland and the impact that the decision will have on public education in the future, especially in the number of civil rights actions that could follow.

Wood v. Strickland: Objectifying the Standard of Good Faith for School Board Members in Defense to Personal Liability Under § 1983, 10 Loy. L.A.L. Rev. 149 (1976).

A discussion of the controversy in the federal courts surrounding the immunity granted governmental officials from personal liability for violation of constitutional rights. The author concentrates his analysis on the issue of whether this immunity should extend to individual members of school boards.

Yudof, Liability for Constitutional Torts and the Risk-Averse Public School Official, 49 S. Cal. L. Rev. 1322 (1976).

This article explores some of the judge-made law and problems that have developed in relation to § 1983 suits in light of Wood v. Strickland, 420 U.S. 308 (1975). It attempts to anticipate the possible impact of Wood through a discussion of the possible meanings of the "good faith" and "settled Law" approach to immunity from damages under § 1983.

Bristow, *§ 1983: An Analysis and Suggested Approach*, 29 Ark. L. Rev. 255 (1975).

The author reviews the body of law that has been created by § 1983 litigation in what he terms an effort to heighten judicial awareness of § 1983 law as an independent body of law. Among the topics discussed are the relationship between § 1983 and the common law of torts; why a body of federal law is necessary to accomplish the goals of § 1983; and what gives rise to a § 1983 claim. The author also reviews a number of cases that have created what he calls § 1983 defenses.

Comment, *State Executive Officials Afforded Qualified Immunity From Liability in Suits Maintained Under § 1983*, 20 Vill. L. Rev. 1057 (1975).

In order to evaluate the Supreme Court's rationale in *Scheuer v. Rhodes*, the author examines the congressional purpose in enacting § 1983, and the prior case law dealing with personal immunity as applied to officials in the judicial, legislative, and executive branches of state government.

Fullwood, *Immunity Under 42 U.S.C. § 1983*, 7 N.C. Cent. L.J. 39 (1975).

This article is a survey of court decisions which played a role in the development of legislative, judicial, executive and administrative immunities under § 1983.

Hundt, *Suing Municipalities Directly Under the Fourteenth Amendment*, 70 Nw. U.L. Rev. 770 (1975).

This article theorizes that recent § 1983 cases illustrate the need for an alternative cause of action for meritorious civil rights claims and that the reasoning of *Bivens* offers the best alternative to § 1983 suits, that is, a judicially created action asserting fourteenth amendment rights directly against municipalities.

Bodensteiner, Federal Court Jurisdiction of Suits Against "Non-Persons" for Deprivations of Constitutional Rights, 8 Val. U.L. Rev. 215 (1974).

This article discusses two Supreme Court rulings -- Moor v. County of Alameda, 411 U.S. 693 (1973), and City of Kenosha v. Bruno, 412 U.S. 507 (1973) -- holding that the scope of "person" as used in § 1983 does not include a county or a municipality for purposes of either equitable relief or damages. The author argues that plaintiffs can obtain both equitable relief and damages from counties and municipalities, if they have a constitutional claim, by stating a claim directly under the Constitution and alleging jurisdiction under 28 U.S.C. §§ 1343(3) and § 1331(a) where the jurisdictional amount is met. By examining three factors -- stating a claim under the Constitution, jurisdiction under § 1331(a), and jursidiction under § 1343(3) -- the author illustrates why Moor and Bruno did not insulate counties and municipalities from suit for deprivations of constitutional rights. The Bruno decision is called wrong for suggesting that jurisdiction cannot be based on § 1343(3), when a cause of action is not stated under § 1983.

Comment, § 1983, Eleventh Amendment, Executive Immunity, 8 Akron L. Rev. 163 (1974).

A comment on Scheuer v. Rhodes classifying the Supreme Court's decision as a restatement of a policy that was already generally understood by most jurists. According to the author, the impact of the decision on executive officials will be slight, however, under § 1983 at least the plaintiff will be granted a day in court.

Judge, Scherott, Bliss, Judicial Immunity Under the Civil Rights Act: Here Come the Judges' Defenses, J. Mar. J. Prac. & Proc. 213 (1974).

In light of the fact that the number of civil rights actions being filed against various members of the judiciary are on the use, this article examines the defenses which are available to judicial and quasi-judicial officers in such actions.

McCormack, Federalism and § 1983: Limitations On Judicial Enforcement of Constitutional Protections, 60 Va. L. Rev. 1250 (1974).

The first part of this article defines a § 1983 cause of action by exploring the relationship between the remedy sought for a given harm and the applicability of the eleventh amendment and personal immunities. The second part examines how this cause of action is affected by the doctrines of abstention and res judicata.

Municipal Liability Under § 1983 of the Civil Rights Act, 5 N.C. Cent. L.J. 351 (1974).

This article attempts to analyze the impact of City of Kenosha v. Bruno, 412 U.S. 507 (1973) in light of the history of the enactment of § 1983, and other Supreme Court interpretations of the Act with regard to municipal liability. It also looks at the federal courts' attempts to evade the seemingly harsh effect of Monroe v. Pape.

Note, Neither the Eleventh Amendment nor the Doctrine of Executive Immunity Automatically Bar a Suit for Damages Brought Against State Officials in Their Individual Capacities Under 42 U.S.C. § 1983 -- Scheuer v. Rhodes, 416 U.S. 232 (1974), 24 Cath. U.L. Rev. 164 (1974).

The author explores the issues posed by eleventh amendment sovereign immunity and common-law executive immunity as presented in Scheuer, and as compared to earlier suits brought under § 1983. Although the decision is termed narrow, the author feels that it promises that section 1983 will not be wholly circumscribed by common-law privileges.

Note, Suit for Damages Under § 1983 Against State Officials for Discretionary Acts Barred by Common Law Doctrine of Executive Immunity, 10 Ga. S.B.J. 669 (1974).

A survey of sovereign immunity and the questions answered and unanswered by the 6th Circuit in Krause v. Rhodes, 471 F.2d 430 (6th Cir. 1972).

Aldisert, Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload, 1973 Law & Soc. Ord. 557.

A criticism of the Supreme Court's recent tendency to extend the reach of § 1983. Instead, the Court should place a premium upon requiring the exhuastion of state remedies and upon the utilization of state courts to resolve matters that would otherwise clog the federal courts. In this article, the author suggests some fundamental reforms that are needed in order to correct this trend.

Kates & Kouba, *Liability of Public Entities Under § 1983 of the Civil Rights Act*, 45 S. Cal. L. Rev. 131 (1972).

The thesis of this article is that municipal immunity is not compelled by the legislative history upon which the *Monroe v. Pape* decision is based, and that, in any event, *Monroe* has been misconstrued by lower courts to immunize public entities which neither the Supreme Court nor the Congress intended to protect. After showing *Monroe* to be misguided, the authors examine four types of § 1983 suits which should be permissible despite the *Monroe* mandate.

Note, *Defense of "Good Faith" Under § 1983*, 1971 Wash. U.L.Q. 666.

A note discussing *London v. Florida Dep't of Health and Rehabilitative Services Division of Family Services*, 313 F. Supp. 591 (N.D. Fla. 1970) in relation to *Monroe* and *Pierson* and their holding that the common-law defenses to torts are available under § 1983. The author believes that this limits the effectiveness of § 1983.

Comment, *Toward State and Municipal Liability in Damages for Denial of Racial Equal Protection*, 57 Cal. L. Rev. 1142 (1969).

The author argues that the complicity of state and local governments in racial discrimination is a "state action" that violates the fourteenth amendment; however, the remedies available are not sufficient to spur governments to change their policies. The problems with bringing suit under common law and the barrier of sovereign immunity are discussed. The author argues that if the courts consider § 1983 inapplicable to states or municipalities under any circumstances, then they could create a remedy pursuant to the fourteenth amendment by making it self-executing with respect to affording monetary damages.

Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 Harv. L. Rev. 1486 (1969).

After examining the purposes of section 1983 and the recent judicial interpretations of the law, the author argues that many deprivations of federally-secured rights are outside the scope of section 1983 and that in such cases, plaintiffs should seek redress in the state courts if state remedies appear adequate to redress the violation.

Comment, Civil Actions for Damages Under the Federal Civil Rights Statutes, 45 Tex. L. Rev. 1015 (1967).

This comment discusses the extent and nature of the broad spectrum of civil rights protected by federal statutes and the problems that have been encountered in assessing pecuniary damages for their infringement.

De Forest, Action of Municipal Housing Authority and Its Director Held not Enjoinable Under § 1983, 3 Harv. C.R. L. Rev. 225 (1967).

An analysis of the District Court's rationale in Randell v. Newark Housing Authority, 266 F. Supp. 171 (D.N.J. 1967), in light of the precedent set by the Supreme Court in Monroe v. Pape with regard to injunctive actions. The writer contends that although the Court clearly intended to foreclose the possibility of injunctive actions against municipalities, the logic behind its decision is vulnerable to attack and a strong district judge might reject this application. However, since the Randell court did not feel it necessary to contradict the Supreme Court, various civil rights violations could be left without legal remedies, if Randell is widely followed.

Shapo, Constitutional Tort: Monroe v. Pape and the Frontiers Beyond, 60 Nw. U.L. Rev. 277 (1965).

This article analyzes the jurisprudential development of a federal statutory remedy -- 42 U.S.C. § 1983. It does so by tracing the prior nine decades of legislative and judicial history of the statute culminating in a discussion of the Supreme Court's ruling in Monroe v. Pape, 365 U.S. 167 (1961).

Note, Section 1983: A Civil Remedy for the Protection of Federal Rights, 39 N.Y.U.L. Rev. 839 (1964).

This note examines 42 U.S.C. § 1983 by attempting to suggest solutions to the following problems involved in its interpretation: 1) Does § 1983 protect against deprivations of all or merely some federal rights? 2) What are the remedies available to a plaintiff deprived of a protected right? 3) What are the legitimate defenses and jurisdictional objections that need to be identified and limited?

STATE SOVEREIGN AND GOVERNMENTAL IMMUNITY

Comment, Sovereign Immunity in Connecticut: Survey and Economic Analysis, 13 Conn. L. Rev. 293 (1981).

This comment surveys sovereign immunity in Connecticut and discusses the impact of federalism on the scope of immunity. It also discusses what light an economic analysis throws on the subject.

De Mars, Intentional Nuisance in Fact: Should it be a Bar to a Governmental Function Defense in Michigan?, 1981 Det. C.L. Rev. 771.

This article is a detailed discussion of the definitional, theoretical and pleading problems that have been created by the Michigan Supreme Court holding that a claim based on an "intentional nuisance in fact," created and then maintained by a governmental agency, is not defeated by statutory immunity. Because the legislature has codified common-law governmental immunity, the author suggests the Michigan legislature should draft the nuisance exceptions into the statute which exist at common law. A proposed amendment is appended to the article, and would impose burdens on both the governmental agency and any plaintiff, as well as a limitation of liability under certain conditions.

Glannon, Governmental Tort Liability Under the Massachusetts Tort Claims Act of 1978, 66 Mass. L. Rev. 7 (1981).

The responsibility of governmental bodies, their officers and employees, for torts committed in the scope of public employment was radically restructured by the Massachusetts Tort Claims Act of 1978 (1978 Mass. Acts, Ch. 512). According to the author governmental immunity in Massachusetts is not dead, but has been transformed. This article explains the principal features of the Act, discusses the major interpretative issues it raises, and speculates as to how some of those issues will be resolved by the courts.

Groszyk & Madden, Managing Without Immunity: The Challenge for State and Local Government Officials in the 1980s, Pub. Ad. Rev. (March/April 1981).

The authors address three major aspects of the state of governmental immunity: 1) the evolving dimunition of state and local government immunity; 2) the rise of fourteenth amendment rights; and 3) the growth in implied rights derived from federal statutes. The conclusion is reached that these factors will combine to foster greater reluctance on the part of state and local governments toward assuming administrative responsibility for federal assistance programs. The article concludes with a discussion of possible remedial measures to secure some measure of immunity for state and local government officials.

Note, Immunity From Suit on Implied Contract: Isn't it Time Kanasas Entered the 20th Century?, 20 Washburn L.J. 557 (1981).

This note discusses state immunity from suit arising from an implied contract, comparing other states' approaches to immunity from suit on a contract. The author analyzes the procedure that must be followed in Kansas to satisfy a claim against the state based on an implied contract.

Note, State Sovereign Immunity, 56 Wash. L. Rev. 277 (1981).

Casenote discussing Nevada v. Hall, 440 U.S. 410 (1979) covering: (1) the doctrine of sovereign immunity in other state and federal courts; (2) the Supreme Court's reasoning in Hall; and (3) suggestions the Court might use in limiting a state court's jursidiction over a sister state in future cases.

Taylor, A Re-examination of Sovereign Tort Immunity in Virginia, 15 U. Rich. L. Rev. 247 (1981).

The author argues that the Virginia State government ought to be responsible for the consequences of its negligent conduct just like any private citizen. According to the author, immunity is a "no-duty" rule which breeds irresponsibility at a time when government encroachment upon individual privacy is pervasive. It is argued that immunity is contrary to the notion that there ought to be a right for every wrong, and that the courts should be available for redress.

Wolcher, Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations, 69 Calif. L. Rev. 189 (1981).

This article explores the problem of vindicating Constitutional rights in state courts by: (1) detailing the current structure and limitations of remedies in federal courts; (2) defining the problems confronting persons seeking damages for constitutional violations by states; (3) considering the duty of the state courts to assume jurisdiction over suits against states; (4) establishing that damage claims against states are not precluded by sovereign immunity; and, (5) analyzing the circumstances under which a state judge must grant the requested remedy against the state.

Cervare & Hardy, The Massachusettes Governmental Tort Liability Act and Its Discretionary Function Immunity: An Analysis and Modest Proposal, 14 Suffolk U.L. Rev. 1251 (1980).

This article outlines the historical developments leading to the Tort Liability Act and focuses on the provision of the Act which perserves a type of governmental immunity for discretionary acts. The author compares this provision with analogous federal and state statutes, and discusses a general analytical framework applicable to situations within the ambit of the new statute.

Comment, Constitutional Law: Governmental Immunity Statute Violates Equal Protections as Applied to Kansas Turnpike Authority, 19 Washburn L.J. 581 (1980).

An historical discussion of the evolution of sovereign immunity in Kansas, and its effect on Flax v. Kansas Turnpike Authority, 226 Kan. 1, 596 P.2d 446 (1979). The author also discusses the factual situation of this case which could provide a useful protection approach in construing the Kansas Tort Claims Act.

Comment, Judicial Clarification of a Common-Law Doctrine: The Pennsylvania Doctrine of Official Immunity, 84 Dick. L. Rev. 473 (1980).

A review of the status of official immunity in Pennsylvania. This comment considers the purposes of this doctrine and evaluates judicial decisions on official immunity. The author examines pertinent sections of a comprehensive tort claims act (Act 152), 42 Pa. Cons. Stat. Ann §§ 2310, as well as the state supreme court decision in DuBree v. Commonwealth, 481 Pa. 540, 393 A.2d 293 (1978).

Comment, The Eleventh Amendment, Sovereign Immunity and Full Faith and Credit: No Constitutional Refuge For a State as a Defendant, 42 U. Pitt. L. Rev. 57 (1980).

A discussion of the Supreme Court's holding in Nevada v. Hall that a state may no longer successfully claim immunity from suit in a court beyond its borders. The author argues that the eleventh amendment provides a basis in support of a state's immunity in a sister state's courts which could lead to the reversal of Hall.

Comment, Wyoming's Governmental Claims Act: Sovereign Immunity With Exceptions -- A Statutory Analysis, 15 Land & Water L. Rev. 619 (1980).

This comment focuses on Wyoming's Governmental Claims Act (Wyo. Stat. §§ 1-39-101 through 1-39-119 and § 26-3 128.1 (Supp. 1979)). An analysis is made of the significant provisions, and the author recommends several changes. The article concludes with a discussion of the extent to which the legislature succeeded in balancing equities through the Act.

Martin, The New Interpretation of Sovereign Immunity for the States, 16 Cal. W.L. Rev. 39 (1980).

Analysis of the Supreme Court decision in Nevada v. Hall that a state may not claim immunity in a private law suit in the courts of another state. The author argues that the Hall decision is a bad piece of Constitutional law, is based upon some very dubious reasoning, and runs against the grain of American Constitutionalism.

McMahon, The State as Defendant: The Doctrine of Sovereign Immunity in Alabama, 41 Ala. Law. 583 (1980).

This article presents a description of the policy reasons for and against the doctrine of sovereign immunity and discusses the areas where sovereign immunity still plays an important role. It describes where it exists and the limitations on its application with particular attention to its development in the State of Alabama.

Note, Hennessy v. Webb: Sovereign Immunity for the Less-Than-Sovereign -- How Far Will It Go?, 32 Mercer L. Rev. 433 (1980).

A critique of the Georgia Supreme Court's opinion in Hennessy v. Webb, 245 Ga. 329, 264 S.E.2d 878 (1980) which utilized the ministerial discretionary function test in applying the doctrine of sovereign immunity. The author suggests that the court should have decided the case based on the traditional concepts of tort law without discussing sovereign immunity, thus reducing the case to a simple trial on the merits.

Note, Holding Governments Strictly Liable for the Release of Dangerous Parolees, 55 N.Y.U.L. Rev. 907 (1980).

This note attempts to determine the extent to which state parole boards and their officers should be held liable when a member of the community is injured by a violent parolee. The author argues in support of: (1) discarding immunity for government and holding the parole institutions strictly liable for injuries resulting from violent crimes; and (2) retaining immunity for officers requiring them to indemnify the government for its liability only when their actions fall below a specified standard of care.

Note, Nevada v. Hall: Sovereign Immunity, Federalism and Compromising Relations Between Sister States, 1980 Utah L. Rev. 395.

The author examines the Supreme Court decision in Nevada v. Hall that state sovereign immunity does not have a Constitutional basis. The historical background of the doctrine of sovereign immunity is reviewed. The author discusses the Court's reference in the decision to "cooperative federalism."

Note, Sovereign Immunity: Application of Missouri's 1978 Sovereign Immunity Legislation to School Districts, 45 Mo. L. Rev. 771 (1980).

A note discussing Beiser v. Parkway School District, 589 S.W.2d 277 (Mo. 1979) in which the writer contends that neither Beiser nor Missouri's sovereign immunity legislation have any effect on municipal employees' personal liability for negligent acts.

Note, Sovereign Immunity in Sister-State Courts: Full Faith and Credit and Federal Common Law Solutions, 80 Colum. L. Rev. 1493 (1980).

This note examines the implications of the freedom given state courts in Nevada v. Hall. It argues that the Supreme Court decision, unless limited, threatens to upset the interstate relationships appropriate to the federal system. The note also expands upon the Court's suggestion that full faith and credit may limit choice of law in suits against states in sister-state courts, and explores some plausible full faith and credit restrictions.

Note, The Abolition of Sister State Immunity: Nevada v. Hall and Territorial Sovereignty, 60 B.U.L. Rev. 601 (1980).

The author analyzes the Supreme Court decision in Nevada v. Hall that there is no express or implied Constitutional provision extending a state's sovereign immunity to sister-state forums. An historical analysis is made to show that sovereign immunity was a common-law doctrine at the time the Constitution was ratified and that no subsequent Constitutional provision provided for sovereign immunity in sister-state courts. The author argues that Hall will not require a fundamental readjustment of the system of cooperative federalism, but, instead, will provide for the balancing of competing state interests.

Note, The Doctrine of Sovereign Immunity is Alive and Well -- Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979), 8 Fla. St. U.L. Rev. 377 (1980).

The author discusses the implications of a Florida State Supreme Court decision that discretionary government actions, i.e. those carried out at the planning rather than the operational level of government, are not subject to liability in tort. It is argued that despite the broad waiver of the doctrine of sovereign immunity in tort actions by the Florida legislature in 1975, the court's ruling makes it clear the doctrine is still alive.

Stewart, The State as an Unwilling Defendant: Reflections on Nevada v. Hall, 59 Neb. L. Rev. 246 (1980).

A discussion of the issues of state sovereign immunity in the context of the Supreme Court decision that a state may be sued against its will by citizens of another state in the latter's courts.

Comment, Governmental Immunity: Has It Really Been Abrogated?, 5 So. U.L. Rev. 217 (1979).

This comment focuses on the many problems that still exist following the abrogation of sovereign immunity in Louisiana in 1974. It attempts to illustrate the impact of this abrogation on the tort law of Louisiana. In order to allow for a comparative analysis of the pre- and post-abrogation eras, the author also presents an historical examination of sovereign immunity.

Note, Municipal Corporations: Municipal Immunity a Changing Doctrine in Oklahoma, 32 Okla. L. Rev. 890 (1979).

A discussion of recent changes in the Oklahoma laws of municipal immunity, culminating in the 1978 Political Subdivision Tort Claims Act (51 Okla. Stat. § 151-70 (1978)), which, according to the author, demonstrate growing dissatisfaction with the broad immunity from tort liability previously enjoyed by municipalities. Although the basis for sovereign immunity is archaic, the author contends that this Act is an attempt to achieve a balance between the need for municipal liability and the needs of individuals injured by the tortious conduct of municipal employees.

Note, Sovereign Immunity in Missouri: Judicial Abrogation and Legislative Reenactment, 1979 Wash. U.L.Q. 865.

This note surveys the case law concerning governmental immunity in Missouri prior to the passage of the Tort Immunity Act, analyzes the impact of the Act on traditional governmental functions, examines the Act's statutory provisions to determine the scope of retained governmental immunity, and critically evaluates what the author sees as the Act's conspicuous omissions.

Note, Sovereign Immunity in the State of Wyoming, 14 Land & Water L. Rev. 271 (1979).

This note reviews the decision in Oroz v. Board of County Commissioners of Carbon County, 575 P.2d 1155 (Wyo. 1978) and speculates whether the sovereign immunity of Wyoming could withstand a challenge in the Wyoming Supreme Court.

Note, State Borders are New Boundaries for Sovereign Immunity -- Nevada v. Hall, 29 De Paul L. Rev. 191 (1979).

The author reviews and analyzes the Supreme Court decision holding that a citizen of California may bring a personal injury action against the State of Nevada without its consent in a California court. Although supporting the decision, the author criticizes what she sees as the Court's failure to adequately delineate the intended scope of its decision.

Note, State's Eleventh Amendment Immunity Substantially Reduced, 10 U. Tol. L. Rev. 541 (1979).

This note examines the purpose and interpretations of the eleventh amendment, followed by a discussion of the traditional reluctance of American courts to award attorney fees. The Supreme Court's holding in Hutto v. Finney, 437 U.S. 678 (1978) is examined in light of this historical background. The author concludes with a discussion of the potential impact of Hutto on allowances from state funds.

Note, The Privileges and Immunities Clause: A Reaffirmation of Fundamental Rights, 33 U. Miami L. Rev. 691 (1979).

The author examines Baldwin v. Fish and Game Commission, 436 U.S. 371 (1978), and discusses its impact on Supreme Court review of the acts of state legislatures that discriminate against nonresidents. The history of the privileges and immunities clause is analyzed, as well as the equal protection clause, and the Court's treatment of these in its decision.

Olson, Governmental Immunity From Tort Liability -- Two Decades of Decline: 1959-1979, 31 Baylor L. Rev. 485 (1979).

Discussion of the status of governmental immunity in Texas after enactment of the Texas Tort Claims Act. The author speculates it is probable that, in time, both the legislature and the courts will further erode the doctrine of sovereign immunity.

Orake & Oldham, Commercial Carrier Decision and the Status of Governmental Immunity in Florida, 53 Fla. B.J. 504 (1979).

A discussion of Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979) in which the authors examine the Florida Supreme Court's rationale in allowing a waiver of sovereign immunity while simultaneously holding that certain governmental functions remain immune from tort liability.

Ripple & Kenyon, State Sovereignty -- A Polished but Slippery Crown, 54 Notre Dame Law. 745 (1979).

Based on an analysis of two Supreme Court decisions involving state sovereignty, National League of Cities v. Usery, 426 U.S. 833 (1976) and Edelman v. Jordan, 415 U.S. 651 (1974), the authors attempt to identify what they term "major ideological vectors" on the Court's view of State government's role in the federal structure. The authors argue that there has not been any massive ideological shift by the Court toward the enhancement of the powers of state governments, particularly in light of the Court's decisions involving the enforcement powers of the fourteenth amendment.

Comment, Absolute Versus Qualified Immunity for Public Officials Acting in Quasi-Judicial Capacities, 24 Wayne L. Rev. 1513 (1978).

A discussion of Grimm v. Arizona Board of Pardons and Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977) in relation to the type of immunity (absolute or qualified) offered to public officials. The rationale of the court is examined to determine how this decision could affect future cases.

Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Constitutional Imposition of Suit upon the States, 126 U. Pa. L. Rev. 1203 (1978).

This article addresses congressional power to override state immunity. It first sets out the case law on the subject and then examines alternate theories supporting congressional power to impose suit upon the states. The interpretive functions of the federal courts in the sovereign immunity area are discussed.

Note, Abrogation of Sovereign Immunity -- Scope of Retained Immunity, 43 Mo. L. Rev. 387 (1978).

This note on Jones v. State Highway Commission, 557 S.W.2d 225 (Mo. 1977) surveys recent decisions and discusses the prevailing judicial treatment of retained governmental tort immunity. The author also analyzes decisions in jurisdictions that have abrogated governmental tort immunity but do not have a statutory exception to liability.

Smith & Singer, Limitations on Federal Judicial Power in Civil Rights Cases: "Persons," Eleventh Amendment, Vicarious Liability, 14 Wake Forest L. Rev. 711 (1978).

This article is an effort to describe the limitations of federal judicial power over claims against states in order to provide a guide for the practitioner, as well as to make some predictions about the probable evolution of these restrictions in areas not yet fully developed by the courts.

Sovereign Immunity in Georgia, 27 Emory L.J. 717 (1978).

A survey of various states' laws which have limited sovereign immunity, and a call for Georgia to implement the immunity waiver schemes called for in the 1974 Court of Claims Amendment to the Georgia Constitution.

Sovereign Immunity In Massachusetts, 13 New Eng. L. Rev. 877 (1978).

An analysis of Massachusetts State Senate bill No. 1647 which was enacted on July 20, 1978 (1978 Mass. Acts Ch. 512). This law complied with a Supreme Judicial Court decision, Whitney v. City of Worcester, 366 N.E.2d. 1210 (1977) severely limiting sovereign immunity in Massachusetts.

Sovereign Immunity in Missouri: The King Was Dead, Temporarily, 47 UMKC L. Rev. 230 (1978).

An analysis of the Missouri Supreme Court decision Jones v. State Highway Commission in which the defense of sovereign immunity was judicially abrogated, only to be severely limited by subsequent legislative action (Mo. Rev. Stat. § 537-600-645 (1978)). The author examines this situation through a review of the development and history of the sovereign immunity doctrine in both the U.S. and Missouri.

Willett, Virginia's Law of Sovereign Immunity: An Overview, 12 U. Rich. L. Rev. 429 (1978).

The purpose of this article is to examine the doctrine of sovereign immunity in Virginia where, as in many other states, the law has undergone change and evolution. The focus is on the immunity of state officers and political subdivisions.

Comment, Abrogation of Sovereign Immunity in Contract Cases in Maryland, 6 U. Balt. L. Rev. 337 (1977).

An analysis of the 1976 Maryland Act which prohibits both state and local units of government from raising the defense of sovereign immunity in certain contract cases (Law of May 4, 1976, Ch. 450, 1976 Md. Laws 1180). The author points out several ambiguities in the Act and recommends changes to remedy this problem.

Comment, Sovereign Immunity: State Liability Under Federal Law and Limits of the Implied Waiver Doctrine, 9 Conn. L. Rev. 247 (1977).

A discussion of the theory of implied waiver of immunity that states may be sued in federal court when they enter federally regulated spheres and cause harm for which federal law provides a private cause of action. The author criticizes Supreme Court decisions interpreting the doctrine as requiring a fair appraisal to states that their conduct in a federally regulated sphere constitutes consent to be sued, as hampering the vindication of federally protected rights and impairing the relationship between a state and its citizens under federal law.

Comments, The Employee Defense Act: Wearing Down Sovereign Immunity, 66 Ky. L.J. 150 (1977).

The author discusses the effect and implications of Kentucky's adoption of the Employee Defense Act with regard to the doctrine of sovereign immunity. The Act is criticized for its indefinite language and for placing a dollar limit on state liability. The author calls on the Kentucky courts to abrogate the doctrine of sovereign immunity, since the legislature appears unlikely to take such action.

Liberman, State Sovereign Immunity in Suits to Enforce Federal Rights, 1977 Wash. U.L.Q. 195.

The author discusses the doctrine of state sovereign immunity and reviews a number of state and federal court decisions, focusing on what are the exceptions to the doctrine's application in federal question cases.

Note, Enforcement of Judgements Against Governmental Entities: The New Sovereign Immunity, 37 La. L. Rev. 983 (1977).

The author describes various cases concerning execution of tort judgements against Louisiana governmental bodies, as well as presenting a brief legislative history of that section of the state constitution governing executions against the state. A recent Louisiana Third Circuit Court of Appeals decision that a plaintiff may not seize public property in an attempt to execute a judgment is discussed in light of the constitutional provision. The author calls for creation by the state legislature of a uniform system for payment of judgments against the state.

Note, The Re-emergence of State Sovereignty as a Limit on Congressional Power Under the Commerce Clause, 28 Case W. Res. L. Rev. 166 (1977).

This note discusses Supreme Court decisions involving the tenth amendment and the limits on federal power where it operates directly on state-conducted activities. It supports the Court's rearticulation of state sovereignty as a basis for immunity from congressional power under commerce clause of the Constitution.

State As A Party Defendant: Abrogation of Sovereign Immunity in Tort in Maryland, 36 Md. L. Rev. 653 (1977).

This article examines the development of sovereign immunity, focusing on its historical roots in England and the early rationales advanced for its use in the United States. The author suggests that Maryland retain immunity only in those limited areas related to the performance of governmental functions that are unique to the government or involve discretionary decision-making. Outside these perimeters legislature should abrogate the state's immunity.

Weick, Erosion of State Sovereign Immunity and the Eleventh Amendment by Federal Decisional Law, 10 Akron L. Rev. 583 (1977).

This article explores recent court decisions discussing the issues of state sovereign immunity from suit in federal courts via the eleventh amendment and the scope of immunity which state officials have in damage suits under the Civil Rights Act.

Harley & Wasinger, *Governmental Immunity: Despotic Mantle or Creature of Necessity*, 16 Washburn L.J. 12 (1976).

An analysis of the *Brown* decisions with a focus on historical development is offered as an example of the judicial thinking which has created changes in the application of governmental immunity. In addition, a state-by-state analysis of governmental immunity is presented to indicate the growing national trend toward statutory schemes which apply the doctrine in a more limited manner.

Note, *Contract Obligations Can Be Enforced Against the State of Oklahoma in an Ordinary Action at Law*, 11 Tulsa L.J. 459 (1976).

A discussion of Oklahoma's requirement for an appropriation before a suit arising from a contract can be instituted against the state without its consent as it applies in *State Board of Public Affairs v. Principal Funding Corp.*, 542 P.2d 503 (Okla. 1975). The author contends that Oklahoma should follow the lead of the many other states which have abrogated the doctrine of sovereign immunity from suits arising from contracts.

Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 Harv. L. Rev. 922 (1976).

This note argues that the Supreme Court's holding in *Bivens* provides the doctrinal basis for a direct right of action for damages under the Constitution against municipalities and other local governmental units. The author examines the Court's treatment of section 1983 and its legislative history and finds that neither bar judicial creation of such a right of action. Finally, the defenses that would be available to a municipality and the components of a *prima facie* case are discussed.

Note, *Kansas Supreme Court Upholds Kansas Governmental Immunity Statutes*, 25 U. Kan. L. Rev. 140 (1976).

Casenote on *Brown v. Wichita State University*, 219 Kan. 2, 547 P.2d 1015 (1976) which begins with a brief history of governmental immunity in Kansas. The author then explores the court's treatment of the federal and state constitutional challenges raised by the plaintiffs. The author examines the equal protection and due process issues and discusses the limitations that the *Brown* court placed on § 2 and § 18 of the Kansas Bill of Rights.

Note, Misapplication of Governmental Immunity -- Epting v. Utah, 1976 Utah L. Rev. 186.

The author analyzes the Utah Supreme Court dismissal of a suit against the state on the basis of two exceptions from the general waiver of immunity contained in the Utah Governmental Immunity Act: the discretionary function exception, and the incarceration exception. A number of cases concerning the discretionary function exception are discussed. The author criticizes the Epting decision for failing to apply a planning-operational analysis to determine if use of the discretionary function exception is appropriate.

Note, Suing State Welfare Officials for Damages in Federal Court: The Eleventh Amendment and Qualified Immunity, 4 Fla. St. U.L. Rev. 105 (1976).

This note discusses the eleventh amendment immunity of state welfare officials from suits for damages in federal courts and the impact of Edelman v. Jordan, 415 U.S. 651 (1974) on welfare litigation. It also considers whether the application of the doctrine of qualified immunity will be of any real benefit to welfare claimants whose benefits have been wrongfully withheld.

Potter, Sovereign Immunity in Pennsylvania, An Open Letter to Mr. Justice Pomeroy, 38 U. Pitt. L. Rev. 185 (1976).

The author proposes that the Pennsylvania Supreme Court's decision in Brown v. Commonwealth, 453 Pa. 566, 305 A.2d 868 (1973) be overturned, and the doctrine of sovereign immunity be put before the General Assembly where the legislature could consider the extent to which the state should be reponsible to its citizens in court.

The Eleventh Amendment: Implied Waiver of State Immunity Re-examined, 53 Chi.[-]Kent L. Rev. 475 (1976).

An examination of the test advanced by the Seventh Circuit Court of Appeals in Williamson Towing Co. v. Illinois, 534 F.2d 758 (7th Cir. 1976), for determining whether a state has waived immunity from suit under the eleventh amendment by participating in a federal program. The test requires a showing of express statutory language providing that the statute's private remedy is applicable to the states. The author concludes that the test is inadequate to aid the courts in handling those statutes which expressly provide for private actions against a class of defendants but remain unclear as to whether Congress intended states be included in that class. The author argues for an alternative test requiring a showing of statutory language from which it could reasonably be inferred that states have been included in the statute's defendant class. Then, courts could consider whether certain specified policy conditions exist which further warrant the conclusion that the statute provides for a waiver of immunity.

Edelman and Scheur: The Relationship Between the Eleventh Amendment and Executive Immunity, 58 Marq. L. Rev. 741 (1975).

The purpose of this article is to examine the effect of the decision in Edelman v. Jordan on the concept of implied waiver by a state of its eleventh amendment protection; to assess its holding as to when a suit against a state officer is barred; and, in conjunction with Scheuer v. Rhodes, 416 U.S. 232 (1974), examine the permissible remedies against state officers.

Note, Edelman v. Jordan: A New Stage in Eleventh Amendment Evolution, 50 Notre Dame Law. 496 (1975).

A critical examination of the broad issue of state immunity from suits in federal courts as treated in Edelman v. Jordan. The author discusses elements of constitutional history and interpretation, conflicting precedents, modern concepts of federalism and the moral responsibilities of government.

Should the King Remove His Armor?, 53 N.C.L. Rev. 1114 (1975).

The author discusses a North Carolina Court of Appeals decision holding that the state waived its immunity from suit by entering into a legislatively-authorized employment contract that it subsequently breached. The historic treatment of the sovereign immunity doctrine by the North Carolina courts is reviewed. The author concludes with an argument for total abolition of sovereign immunity.

Theis, "Good Faith" as a Defense to Suits for Police Deprivations of Individual Rights, 59 Minn. L. Rev. 991 (1975).

A discussion of two eighth circuit opinions -- Mattes v. Schnarr, 502 F.2d 588 (8th Cir. 1974) and Bill v. Wolff, 496 F.2d 1252 (8th Cir. 1974) -- in which the court allowed a police officer's defense that he thought his actions were lawful, thus creating a new shield against charges of official misconduct. After much consideration, the author finds this new doctrine to be both unfounded and misguided.

Whitehill, The Eleventh Amendment and Sovereign Immunity: Vagaries of a Federal Fiction, 10 Tulsa L.J. 436 (1975).

A discussion of the federal courts' recent attempts to allow legitimate redress against a state while swearing continued allegiance to the traditional postulate of state sovereign immunity. This anomaly exists due to the persistent federal problems anchored in the application of eleventh amendment rights.

Comment, Scheuer v. Rhodes: A Restatement of Absolute Immunity, 60 Iowa L. Rev. 191 (1974).

This comment explains the potential significance of Scheuer v. Rhodes upon damage litigation involving state officials in federal courts. It surveys the relevant tests for determining whether the eleventh amendment acts as a bar to such action. The author discusses the common-law doctrine of executive immunity with emphasis on the test promulgated by Scheuer for determining the degree of immunity for state officers.

Comment, Sovereign Immunity and the Tennessee Governmental Tort Liability Act, 41 Tenn. L. Rev. 885 (1974).

The comment begins with an historical survey of sovereign immunity with emphasis on its treatment in Tennessee. The remainder of the comment focuses on the Tennessee Governmental Tort Liability Act, and the influence it has had upon judicial refinements of sovereign immunity, most notably the governmental-proprietary distinction and the municipality-county differentiation.

Davis, An Approach to Legal Control of the Police, 52 Tex. L. Rev. 703 (1974).

Through an examination of seven questions, the author suggests that the use of an exclusionary rule for the judicial control of the police should be supplemented by two other tools. The first is judicially-required police rule-making. The second is tort liability, not of officers, but of governmental units, for police abuses.

Morgan, Cameron v. State: Widening the Breach in Governmental Immunity, 9 Lincoln L. Rev. 107 (1974).

The ruling handed down by the California Supreme Court in Cameron v. State, 7 Cal. 3d 318, 102 Cal. Rptr. 305, 497 P.2d 777 (1972), provides the author some new insights to an old problem. The true stature of this case stands out when high-lighted against the background of prior law in the area of governmental immunity.

Note, Governmental Immunity in Ohio: Common Law Doctrine or Constitutional Prohibition, 3 Cap. U.L. Rev. 134 (1974).

A note on Krause v. State, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972) which court granted constitutional status to the doctrine of governmental immunity by its interpretation of Section 16, Article I of the Ohio Constitution. This decision, in effect, ended all judicial power to consider the policy merits of the doctrine.

Note, Governmental Immunity in West Virginia -- Long Live the King?, 76 W. Va. L. Rev. 543 (1974).

This note discusses the basis for the governmental immunity doctrine in West Virginia by examining its sources; limitations imposed by statutes and judicial decisions; possible ways of avoiding the effects of the doctrine as it presently exists; and factors to be considered with regard to an eventual abolition of the doctrine.

Note, Governmental Immunity Judicially Abrogated in Pennsylvania, 25 Mercer L. Rev. 969 (1974).

A casenote on Ayala v. Philadelphia Board of Public Education, 305 A.2d 877 (Pa. 1973) beginning with a survey of the distinctions between governmental and sovereign immunity and concluding with the author's argument that the doctrine of governmental immunity has become a form of licensed negligence, insofar as the burden borne by the injured citizen.

Note, Official Immunity In Ohio: How to Sue the King's Men, 43 U. Cin. L. Rev. 557 (1974).

This note traces the development of official immunity in Ohio. Exceptions to the doctrine are discussed in an effort to describe those circumstances in which a state officer may be sued. Finally, official immunity is discussed in light of underlying policy issues and alternatives are suggested which more fairly balance individual rights and public interests.

Note, Pennsylvania Abrogates Governmental Immunity, But Refuses to Abolish Sovereign Immunity, 8 U. Rich. L. Rev. 372 (1974).

Casenote on Ayala v. Philadelphia Board of Public Education and Brown v. Commonwealth that attempts to explain the effect of Ayala as laying a foundation for future courts to abolish sovereign immunity in despite Brown's rejection of that abrogation.

Comment, Governmental Immunity: The End of "Kings X", 34 La. L. Rev. 69 (1973).

This comment examines a Louisiana Supreme Court decision that governmental agencies are not immune to suit in tort and compares it with decisions abrogating the doctrine of sovereign immunity in other states. The author argues that an immunity rule should be adopted by courts that limits the standard that there must be a duty owed to the injured individual which is different from that owed to the general public. If such a duty is found, the nature of the governmental function (i.e., judicial or legislative, governmental or proprietary) is irrelevant.

Comment, Governmental Privileges: Roadblock to Effective Discovery, 7 U.S.F.L. Rev. 282 (1973).

This comment explores the problem of governmental privilege and the role it plays in criminal discovery in California. The focus is on the defense attorney and what information may be denied him because of this privilege.

Comment, Governmental Tort Immunity in Pennsylvania: A Job for the Judiciary, 46 Temp. L.Q. 345 (1973).

A discussion of the problems involved in abolishing governmental immunity in Pennsylvania. The author contends that although the judiciary created and nurtured the doctrine, the Pennsylvania Supreme Court refuses to abrogate it believing such action to be a legislative prerogative.

Comment, Judicial Abrogation of Governmental and Sovereign Immunity: A National Trend with a Pennsylvania Perspective, 78 Dick. L. Rev. 365 (1973).

The author discusses two Pennsylvania Supreme Court decisions -- one abolishing the immunity of local governmental units from tort liability, and the other upholding the concept of sovereign (state) immunity. The treatment of both types of immunity in other states is examined in detail, as are their historic roots. Finally, obstacles to courts abrogating existing law of government immunity are discussed using a number of other states and Pennsylvania as examples. The author believes that should the Pennsylvania legislature fail to enact comprehensive tort legislation, the court should abolish the doctrine of sovereign immunity on the theory that it was court-originated and can be court-abrogated.

Comment, State Sovereign Immunity: No More King's X?, 52 Tex. L. Rev. 100 (1973).

This comment discusses the effect the Supreme Court decision Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279 (1973) will have on state sovereign immunity. The background to the adoption of the eleventh amendment to the Constitution is examined as is the development of the implied waiver theory. The author criticizes the Supreme Court decision as not being broad enough to insure that the federal government remains supreme within its proper sphere of action.

Comment, The Role of the Maine Law Court in Abrogating the Common-Law Doctrines of Governmental and Charitable Immunity, 25 Maine L. Rev. 359 (1973).

This comment examines whether the public policy issues embodied in the immunity rules and the reliance interests attributed to those rules by the Maine Law Court justified the radical departure from the court's traditional role of deciding cases properly before it. By analyzing four decisions, the author reveals a failure by the court to fully acknowledge its role as policy-maker and to recognize that reliance upon the immunity rules is unfounded and unworthy of the court's protection.

Jackson, Governmental Immunity -- A Plea for Legislative Action, 61 Ill. B.J. 322 (1973).

A discussion of the insurance provisions of the Illinois Tort Claims Act which has created a serious problem -- governmental units may determine for themselves whether they will be obligated to respond by payment of damages to victims of their negligence. The author feels that this situation is potentially unconstitutional and needs prompt attention from the legislature.

Note, Equal Protection and State Immunity From Tort Liability, 1973 Wash. U.L.Q. 716.

A note on Krause v. State, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972), in which the author discusses the Ohio Supreme Court's rationale in using the "reasonable relation" test over the "equal protection" test in applying state immunity. He believes that although the choice is easily justifiable, the court should have more closely examined the rationality of these classifications under Ohio law.

Note, State Sovereign Immunity Bars Employee Suits in Federal Court Under the Fair Labor Standards Act, 23 Cath. U.L. Rev. 171 (1973).

A discussion of aspects of the Supreme Court decision in Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare that the 1966 amendments to the Fair Labor Standards Act did not deprive a state of its Constitutional immunity to suit in a federal forum by employees of its nonprofit institutions.

Comment, The Colorado Governmental Immunity Act: A Judicial Challenge and the Legislative Response, 43 U. Colo. L. Rev. 449 (1972).

This comment examines the substance of the Colorado Governmental Immunity Act (Colo. Rev. Stat. Ann. §§ 130-11-1 et seq. (Supp. 1971)) in order to suggest how key provisions should be interpreted and to evaluate its impact with respect to prior law.

Minge, Government Immunity From Damage Actions in Wyoming, 7 Land & Water L. Rev. 229 (1972).

This article examines the extent to which governmental immunity shields the state of Wyoming and its political subdivisions from liability for damages -- primarily damages in tort -- and to make some recommendations.

Note, Abrogation of Governmental Immunity, 6 U. Rich. L. Rev. 397 (1972).

According to the author, decisions such as Proffitt v. State, 482 P.2d 965 (Colo. 1971); Flournoy v. School District Number One, 482 P.2d 966 (Colo. 1971), and Evans v. Board of County Commissioners, 482 P.2d 968 (Colo. 1971), have responded to the criticism of governmental immunity be abrogating this doctrine in Colorado. This note focuses on the application of various approaches to abrogation.

Note, Krause v. State: Is Ohio Sovereign Immunity Unconstitutional?, 33 U. Pitt. L. Rev. 611 (1972).

The Ohio Court of Appeals held in Krause v. State, 28 Ohio App. 2d 1, 274 N.E.2d 321 (1971) that the doctrine of state sovereign immunity violates the equal protection clause of the Constitution and is therefore null and void. This note examines the decision and comments upon its prospective effect on the State of Ohio.

Note, Sovereign Immunity -- Denial of Equal Protection, 52 B.U.L. Rev. 202 (1972).

This note discusses the implications of the holding by the Court of Appeals for Cuyahoga County, Ohio, that the operation of the doctrine of sovereign immunity in Ohio results in discrimination prohibited by the fourteenth amendment, and cannot be used to shield the state from responsibility for the tortious acts of its agents.

State Sovereign Immunity Bars Employees' Suit Against State Employer Even Though Congress Has Applied the Fair Labor Standards Act to States as Employers, 17 Vill. L. Rev. 713 (1972).

A discussion of Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare, 452 F.2d 820 (8th Cir. 1971). The author puzzles over whether the decision was based upon the eleventh amendment or common-law sovereign immunity and proposes reasons for believing it to be the former.

Note, Sovereign Immunity In Indiana -- Requiem?, 6 Ind. L. Rev. 92 (1972).

The author traces the development of the concept of governmental tort responsibility in Indiana. An Indiana Supreme Court decision holding state tort liability must be determined in the same manner as that of cities and counties is analyzed. The author concludes that all that remains to shelter the state from potential tort liability is the common-law privilege of immunity extended to governmental employees for discretionary acts.

Note, The Doctrine of Immunity Judicially Abrogated and Legislatively Reinstated, 50 J. Urb. L. 154 (1972).

A brief discussion of Maki v. East Tawas, 385 Mich. 151, 188 N.W.2d 593 (1971) and the struggle between the traditional broad application of sovereign immunity except when a state consented to be sued and the modern trend toward narrowly construing the immunity doctrine.

Alperin, Immunity of Administrative Officials From Tort Liability in Massachusetts, 56 Mass. L.Q. 79 (1971).

This note reveals that while the federal courts and most state courts have adopted rules of absolute or qualified immunity, Massachusetts has not clearly done so. The author examines the Massachusetts case law which has dealt with the issue of immunity for officials and attempts to assess the present status of the law in this area.

Comment, Governmental Immunity in Kansas: Prospects for Enlightened Change, 19 U. Kan. L. Rev. 211 (1971).

The initial holding by the Kansas Supreme Court that the state and its agencies are not immune from suits for their torts while engaged in proprietary functions is discussed in this comment. (Carroll v. Kittle, 203 Kan. 841, 457 P.2d 21 (1969)). The history of the doctrine of governmental immunity is reviewed and the recent fluctuations in the doctrine as applied in Kansas are examined. The author suggests possible alternatives for future legislative action.

Freeman, Circumventing Immunities, Charitable and Governmental, 6 Forum 178 (1971).

The author discusses a number of stratigems that a lawyer might employ to circumvent New Jersey's legislative enactments preventing suits against government bodies.

Greenhill & Murto, Governmental Immunity, 49 Tex. L. Rev. 462 (1971).

This article opens with a general discussion of state and local governments' immunity from tort claims. The Texas Tort Claims Act is examined and its provisions are compared with the laws of other states. The authors call for substantial modification of the doctrine of absolute immunity from tort claims, with a general reservation of immunity only at the planning and policy-making levels, and in the areas of legislative and judicial actions.

Kionka, The King Is Dead, Long Live the King: State Sovereign Immunity in Illinois, 49 Ill. B.J. 660 (1971).

This article reviews the status of sovereign immunity in Illinois. According to the author, the tort liability of the State of Illinois is much more limited and uncertain under the present law than that of local governments and other institutions. The author also discusses the 1970 Illinois Constitution which he believes provides an opportunity to create a uniform system permitting suits against the state in Illinois courts.

Comment, *Waiver of State Immunity: Private Damage Actions Against the States Arising Under Federal Law*, 50 B.U.L. Rev. 590 (1970).

Where a cause of action arises under validly enacted federal law, the federal courts will have jurisdiction, even in suits against a state. The doctrines of state immunity have no vitality when confronted with a federally-created right. *Briggs v. Sagers*, 424 F.2d 130 (10th Cir.), *cert. denied*, 400 U.S. 829 (1970).

Eichner, *A Century of Tort Immunities In Virginia*, 4 U. Rich. L. Rev. 238 (1970).

This article traces the origins of common-law tort immunities in Virginia and points out the manner in which courts in other states have been handling the question of tort immunity.

Governmental Tort Immunity in Kansas, 10 Washburn L.J. 59 (1970).

This article provides a survey of governmental immunity and presents ideas and alternatives which the author hopes may lead to reform of the anachronism of governmental immunty as exists in Kansas.

Greenhill, *Recent Developments in Governmental and Charitable Immunities*, 21 Fed'n Ins. Couns. Q. 123 (1970).

The author reviews a number of recent decisions by various state supreme courts involving charitable and governmental immunities. Although he sees no compelling reason for the failure by courts to examine or re-examine the charitable immunity doctrine, he believes that governmental immunity cannot and should not be wholly abolished.

Comment, *The Governmental Immunity Doctrine in Texas -- An Analysis and Some Proposed Changes*, 23 Sw. L.J. 341 (1969).

The purpose of this comment is to examine the status of governmental immunity in Texas; to determine the constitutional power of the legislature to act in this area; to analyze the develoments in the remaining forty-nine states and to suggest basic standards which should be embodied in any future legislation.

Flint, Governmental Tort Immunity in Georgia, 5 Ga. St. B.J. 494 (1969).

The author's purpose is to examine and evaluate the present application of governmental tort immunity in Georgia in view of the steady trend in other jurisdictions toward altering or abolishing this doctrine. He attempts to determine what, if any, changes or alternatives to this doctrine are justified.

Blades, Comment on Governmental Tort Immunity in Kansas, 16 U. Kan. L. Rev. 265 (1968).

The author of this article attempts to demonstrate that the substance of criticism of governmental immunity applies with full force to the doctrine as it currently exists in Kansas, and then considers what must be done to set in motion to processes of needed reform in the state.

Comment, State Governmental Corporation Immunity From Federal Jurisdiction Under the Eleventh Amendment, 72 Dick. L. Rev. 296 (1968).

The author argues that a diversity action in federal court against a state governmental corporation is a prohibited suit under the eleventh amendment. A number of federal court decisions on this issue are discussed, and the immunity of federal governmental corporations is reviewed. The author criticizes the federal court decisions denying immunity as unwarranted extensions of the power of the federal judiciary over the affairs of the states.

Greenhill, Should Governmental Immunity for Torts Be Re-Examined, and, If So, By Whom?, 31 Tex. B.J. 1036 (1968).

This article surveys the status of doctrines of charitable and sovereign immunity as they exist in the State of Texas, in light of Watkins v. Southcrest Baptist Church, 399 S.W.2d 530 (Tex. 1966). The author concludes that legislative action is the best means to modify these immunities.

Jenkins, Impact of Sovereign Immunity of Subcontractors Dealing with State and Local Government, 2 Pub. Cont. L.J. 27 (1968).

This article is a reprint of a speech concerning the sovereign immunity defense and other remedies available to contractors dealing with states which adhere to the doctrine of sovereign immunity.

Lansing, The King Can Do Wrong: The Oregon Tort Claims Act, 47 Or. L. Rev. 357 (1968).

The Oregon Tort Claims Act (Or. Rev. Stat. §§ 30.260 -.300 (1967)) waives governmental immunity to tort liability in some areas, but it retains it in others. The author's purpose in this article is to analyze the Act and to shed as much light as possible on its sometimes conflicting applications of immunity and liability.

Note, California Public Entity Immunity From Tort Claims by Prisoners, 19 Hastings L.J. 573 (1968).

The author attempts to determine the extent to which a public entity is protected from suit by a prisoner under the California Tort Claims Act for injuries caused by its employees. The Act immunizes public entities from liability for injuries to prisoners. The general effect of the Tort Claims Act is examined, as well as the public entity immunity provision and court decisions interpreting it. The author criticizes various decisions that he feels continually seek new ways of avoiding the immunity created. He argues that the legislature should either make its intent clear and close the loopholes, or, more preferably, repeal the immunity provision and permit the doctrine of respondeat superior to be applied.

Note, Sovereign Liability for Defective or Dangerous Plan or Design -- California Government Code Section 830.6, 19 Hastings L.J. 584 (1968).

The author examines the legislative background and policy goals of a section of the California Tort Claims Act dealing with immunity from libility for injuries resulting from the plan or design of public property. Two court decisions illustrating conflicting approaches to the section are reviewed, with the author arguing that the one finding liability for breach of a continuing duty to operate in safe condition, whether the defective condition arose from the daily use of government property or from a structural defect of the property, should be sustained.

Note, The Discretionary Immunity Doctrine in California, 19 Hastings L.J. 561 (1968).

The author discusses the section in the California Tort Claims Act that provides that governmental officials are not personally liable for harm resulting from "discretionary" acts within the scope of their authority. Court decisions prior to enactment of the Act, and the legislative intent in its adoption are examined. The author describes and appraises the various judicial approaches to interpretating the immunity provision used by California courts. One, the "dampen the ardor" approach, is cited as being more in tune with the legislative intent because it balances the needs of the public for uninhibited decision-making with the loss suffered by the injured plaintiff.

Comment, Ohio Sovereign Immunity: Long Live, 28 Ohio St. L.J. 75 (1967).

Despite repeated attacks on the doctrine of sovereign immunity, it retains its vitality in most jurisdictions. This comment has a twofold purpose in exploring this phenomenon: 1) to set out the Ohio position on sovereign immunity, and 2) to propose a modest step toward abolition of the doctrine in Ohio.

Note, Claims Against the State of Ohio: The Need for Reform, 36 U. Cin. L. Rev. 239 (1967).

An examination of governmental immunity and its consequences under the present system in Ohio primarily concerning the issue of government tort liability. Various methods of abrogating governmental immunity are discussed with the major emphasis on underlying policy issues. Finally, the writer presents his views on desirable provisions of legislative measures for reform of the doctrine in Ohio.

Note, Governmental Immunity -- Special Procedural Requirements Unconstitutional, 17 De Paul L. Rev. 236 (1967).

The author discusses various decisions by the Illinois Supreme Court in their effort to update the rules concerning governmental tort liability. The argument is made that recent decisions by the court have established a trend toward placing upon governmental agencies, with certain modifications, the same responsibility individuals or business entities have with respect to tort liability.

Note, Utah Governmental Immunity: An Analysis, 1967 Utah L. Rev. 120.

This note attempts to assign the Utah Act its place in the history of governmental tort immunity, and to analyze it in the context of prior Utah law. The author compares it with similar statutes in other states, and attempts to provide some guidelines for judicial construction and further refinement.

O'Brien, Suing the Sovereign in Tort, 43 L.A.B. Bull. 11 (1967).

This article discusses two main segments of the 1963 California statute establishing the ground rules for filing and enforcing tort claims against public entities (Stats. 1963, Ch. 1681). Both segments are contained in Division 3.6 of the Government Code -- Parts 3 and 4 concerning procedures for filing a claim and for bringing an action; and Part 2, concerning liability.

Ross, State Immunity and the Arkansas Claims Commission, 21 Ark. L. Rev. 180 (1967).

This discussion of governmental immunity cases in Arkansas first attempts to determine which state organizations, agencies, and institutions fall within the phrase "the State of Arkansas" and therefore enjoy immunity, and which do not and are protected only by common law. Following this classification, the author examines the artful efforts of plaintiffs to involve the state in actions without making the state a "defendant." Once accomplished, he discusses when the state is actually a defendant as the term is used in the state constitution.

Snouffer, Sovereign Immunity, Suits Against Public Officers, and the Dead Letter of Oregon Law, 46 Or. L. Rev. 286 (1967).

This article discusses the conflict of an Oregon constitutional provision preserving sovereign immunity until such time as the legislature enacts a general law for bringing suit against the state, and a legislative provision allowing suits to be brought against public officers.

Alstyne, Governmental Tort Liability: A Decade of Change, 1966 U. Ill. L.F. 919.

This article reviews recent developments with respect to governmental tort responsibility in 14 different jurisdictions where the law has undergone substantial change. Attention is directed primarily to the degree in which the barriers of governmental immunity hve been broken down and supplanted by new rules governing tort liability and immunity. An effort is made to assess the significance of the recent developments and their future meaning.

Comment, From Richard to Myers and Beyond: The King is Dead; Long Live the King, 43 U. Det. L.J. 404 (1966).

This comment traces the path from Richards v. School District of the City of Birmingham, 348 Mich. 490, 83 N.W.2d 643 (1957) which contained the first utterance of disatisfaction with the doctrine of sovereign immunity, to Myers v. Genesee County Auditor, 375 Mich. 1, 133 N.W.2d 190 (1965) which was a complete judicial undoing of immunity.

Comment, State Immunity In Illinois; The Court of Claims, 15 De Paul L. Rev. 340 (1966).

This comment examines the historical background of Illinois Constitution Article IV § 26, the sovereign immunity clause, the current laws which affect it, and speculates on its future application.

Lawyer, Birth and Death of Governmental Immunity, 15 Clev.-Mar. L. Rev. 529 (1966).

The author traces the development of the doctrine of governmental immunity through court decisions, and examines the results in states where the doctrine was judicially abrogated. The author argues that there is really no justification for retention of the doctrine and that courts should take the initiative in this area in an effort to prod state legislatures into action.

Mathes & Jones, Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions, 53 Geo. L.J. 889 (1965).

The authors briefly review the civil liability of public entities and individual officers absent a federal statute and under federal law (the Civil Rights Act) and conclude there are numerous defects in the present system. The authors call for courts to elaborate a "scope of official duty" immunity for police officers. The possibility of liability could still be retained in the case of facts showing plain excess or dereliction, such as Monroe v. Pape, 365 U.S. 167 (1961).

Mosk, Problems of Sovereign Liability, 3 San Diego L. Rev. 7 (1966).

A brief history of sovereign immunity followed by an outline of the anticipated legal, governmental and fiscal problems California might face in view of its abrogation of sovereign immunity. The author bases his outline on references to New York cases because New York was the first state to impose governmental liability.

Schoenbrun, Sovereign Immunity, 44 Tex. L. Rev. 151 (1965).

The author describes the operation of the doctrine of sovereign immunity as it applies to parties entering contractual relationships with the State of Texas. Various methods of avoiding the doctrine's application, *i.e.* legal arguments, securing legislative permission to sue the state, are discussed. The author argues for creation of an administrative board to handle some claims against the state, and outright waiver of immunity in other situations so the courts could handle the claims.

Comment, Governmental Immunity in Arizona: The Stone Case, 6 Ariz. L. Rev. 102 (1964).

The author's purpose in this comment is threefold: 1) to give a brief survey on the doctrine of governmental immunity; 2) to review the rationale of court decisions in other states involving the issue of governmental immunity; and 3) to examine Arizona's position and discuss some of the problems which will confront public bodies in the state and to suggest possible solutions.

Comment, The Disappearing Doctrine of Governmental Immunity From Tort Liability, 26 Ga. B.J. 435 (1964).

The author reviews the historic applications by courts at the state and county levels of the doctrine of sovereign immunity. The trend toward governmental responsibility is discussed and it is argues that the entire doctrine of excusing governmental entities for their neglect was, and remains, a mistake.

Comment, The Role of the Courts in Abolishing Governmental Immunity, 1964 Duke L.J. 888.

The author argues for judicial abolition of the doctrine of governmental immunity in order to press legislatures into action. He supports a cautious approach by the courts, and recommends that their objective should be to creat a workable framework which will instill confidence within public entities and legislatures, thus facilitating a climate in which an orderly, comprehensive legislative solution can grow.

Governmental Liability for Torts of Employees: The End of Sovereign Immunity in California, 5 Santa Clara Law. 81 (1964).

An examination of those provisions of a 1963 California statute (Cal. Gov't Code §§ 810-895.8) which the author believes bring an end to the doctrine of sovereign immunity in the state. This results from the application of general liability to governmental entities, rather than establishing general immunity, which was the original intent.

Hamill, The Changing Concept of Sovereign Immunity, 13 Def. L.J. 653 (1964).

The author discusses the Oklahoma Supreme Court decision Ard v. Oklahoma City, 382 P.2d 728 (Okla. 1963) concerning tort liability of a municipal corporation for personal injuries, and reviews the case histories in the development of the doctrine of sovereign immunity. The test of governmental versus proprietary functions is reviewed, and a summary of the status of the doctrine of sovereign immunity in each of the 50 states is provided.

Comment, Sovereign Immunity in Colorado, and the Feasibility of Judicial Abrogation, 35 Colo. L. Rev. 529 (1963).

This comment traces the history of the doctrine of sovereign immunity in Colorado. It also discusses cases in other states which have judicially modified or abolished the doctrine so that some perspective can be gained as to the possible results, should Colorado follow suit.

Ghiardi, Abolition of Tort Immunity, 24 Gavel 30 (1963).

The author provides a brief summary of the Wisconsin Supreme Court decisions abolishing government, charitable and religious immunity.

Judicial Abrogation in Wisconsin; Outlook for Colorado, 35 Colo. L. Rev. 265 (1963).

An analysis of Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962) focusing on the trend toward abrogation of the doctrine of sovereign immunity. The writer considers the question of how abrogation should take place in Colorado -- through the courts or the legislature.

Note, Sovereign Immunity -- Legislative Role -- Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962), 12 Cath. U.L. Rev. 58 (1963).

A discussion of the Wisconsin Supreme Court decision that a public body shall be liable for damages for the torts of its officers, agents and employees, whether by omission or comission, occuring in the course of business of such public body, by reason of the rule of respondeat superior. The author examines cases in other states that have met limited success against sovereign immunity and the statutory and legislative regimes in those states.

Stanton, Sovereign Immunity, 38 Cal. St. B.J. 177 (1963).

This article is the work of the California Law Revisions Commission on the status of sovereign immunity in California. It summarizes the Commission's study of existing legislation and briefly outlines several recommendations submitted to the State legislature.

Davis, Suing the Government by Falsely Pretending to Sue an Officer, 29 U. Chi. L. Rev. 435 (1962).

The author contends that the federal courts have upheld the doctrine of sovereign immunity by using false pretenses in the disposition of cases. He believes that even if no one is harmed by these fallacies, they do cause damage. This is shown by joinder of superior officers and developments concerning substitution of successor officers.

Comment, Liabilities of Public Bodies, Officers, and Employees -- Governmental Immunity, 11 Drake L. Rev. 79 (1962).

The author discusses the general scope of governmental immunity in Iowa, and a variety of substantive rules and procedural aspects applicable to different classes of cases dealing with this area. He also reviews a number of recent decisions by Iowa courts and, actions by the Iowa legislature.

Hestler, Judicial Legislation and the Doctrine of Governmental Immunity, 39 U. Det. L.J. 570 (1962).

An analysis of Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961) and McDowell v. Mackie, 365 Mich. 268, 112 N.W.2d 491 (1961) that describes the two cases as being the end of governmental immunity in Michigan. Prior to these rulings, the common-law doctrine of governmental immunity was in full force and effect in Michigan except as modified by the legislature.

Note, *Government Immunity Unavailable to California State Agencies Except in Some Cases of Discretionary Acts*, 46 Minn. L. Rev. 1143 (1962).

The author discusses two California Supreme Court decisions rejecting the doctrine of governmental immunity. Decisions by the highest courts of Florida and Illinois following the same line are also described. The author criticizes one of the California decisions as attempting to implement a rule of governmental liability under a test of impaired function which he feels is too subjective.

Note, *Governmental Immunity Doctrine Modified to Permit Tort Liability for Ministerial Acts*, 9 UCLA L. Rev. 266 (1962).

Note discussing the effects of *Muskopf v. Corning Hospital District*, 55 Cal. 2d 211, 359 P.2d 457 (1961) on various provisions of the California code that deal with governmental immunity and official liability.

Note, *Sovereign Immunity: Will Ohio Follow Michigan's Lead?*, 31 U. Cin. L. Rev. 307 (1962).

The author urges the Ohio courts to follow Michigan's lead in doing away with the sovereign immunity doctrine as judicial precedent. Such action would force the legislature to create a more workable rule. The author reaches this position after making an examination of the historical background of sovereign immunity and the evolution of the law in Ohio.

Cases, *Sovereign Immunity*, 35 Temp. L.Q. 112 (1961).

This article provides brief over-views of the status of the doctrine of sovereign immunity in various states.

Comment, *Abolition of Sovereign Immunity in Washington*, 36 Wash. L. Rev. & St. B.J. 312 (1961).

Comment on the Washington State legislature's apparent abolition of the doctrine of sovereign immunity with enactment of Wash. Sess. Laws 1961, Ch. 136. The author questions whether the abolition is in fact only partial and attempts to predict its full impact.

Comment, *Right of Court to Abrogate Immunity Without Legislative Consent*, 37 N.D.L. Rev. 373 (1961).

A comment on *Muskopf v. Corning Hospital District*, in which the writer argues that while blind allegiance to antiquated and outgrown precedent should not be condoned, the courts have recognized immunity only with reluctance because they feel bound by precedent and Constitutional divisions of powers.

Crahan, Governmental Tort Responsibility In California, 36 L.A.B. Bull. 415 (1961).

The author discusses the merits of Muskopf v. Corning Hospital District and briefly comments on the state of governmental immunity in California. He suggests some possible solutions to the problem of government tort liability, which he categorizes as being "socio-legal" in nature.

Note, Governmental Immunity Abolished and then Reinstated on Another Basis in California, 38 U. Det. L.J. 675 (1961).

A discussion of the doctrine of governmental immunity and its historical development from English common law through Muskopf v. Corning Hospital District.

Note, Official Immunity: Scope of Authority Restricted [Lipman v. Brisbane Elementary School District, 359 P.2d 465 (Cal. 1961)], 49 Calif. L. Rev. 772 (1961).

A discussion of a California Supreme Court decision that acts by officials outside the scope of their authority were not entitled to the protection of official immunity. The author compares the California decision to current federal courts statements on the limits of scope of authority.

BACKGROUND REPORT FOR RECOMMENDATION 82-7
(AS PUBLISHED IN TULANE LAW REVIEW, VOL. 57, NO. 4, APRIL 1983)

CONGRESSIONAL LIMITATIONS ON JUDICIAL REVIEW OF RULES*

PAUL R. VERKUIL**

One of the persistent questions of judicial review is whether and when Congress may preclude or severely restrict access to the courts by those who seek to challenge the validity of administrative action. This issue invokes a rich but perplexing jurisprudence. In its larger context, the problem of legislative usurpation of judicial power is front page material,[1] and the Supreme Court has recently insisted that it and not Congress has the last word in interpreting article III.[2] The literature and decisions dealing with the broad issues overlook, however, the important question of how far Congress can go in regulating the timing or scope of judicial review of administrative rules of general applicability. This study is intended to build the necessary theoretical bridge between the jurisprudence of article III and the problem at hand.

---

* This article is based on a report submitted by the author as consultant to the Administrative Conference of the United States that supported Conference Recommendation 82-7, 47 Fed. Reg. 58,208 (1982), to be codified at 1 C.F.R. § 305.82-7. The Conference authorized this publication, but the author remains solely responsible for its content.

** Dean and Professor of Law, Tulane Law School. The author is indebted to William H. Allen, Richard Berg, David Currie, Candace Fowler, Walter Gellhorn, Neil Kennedy, Jeffrey Lubbers, Richard Pierce, and Peter L. Strauss for helpful comments and criticisms of earlier drafts.

[1] *See* 128 Cong. Rec. § 1318 (daily ed. Mar. 2, 1982) (discussion of Helms-Johnston antibusing amendment). *See generally* Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17 (1981).

[2] *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858, 2867 (1982) (declaring Congress' grant of bankruptcy jurisdiction to article I judges in violation of the judicial power under article III) (citing Baker v. Carr, 369 U.S. 186, 211 (1962)).

THE PROBLEM POSED

This study begins with principles established and statutes enacted during the 1940s, but it focuses primarily upon regulatory activities in the 1970s. The case that triggered much of the recent activity is *Abbott Laboratories v. Gardner.*[3] *Abbott* permitted nonstatutory preenforcement review of rules over objections that the exclusive method of review, intended by Congress, was an enforcement proceeding after a "final order" based on the rule was issued. As if in reaction to this functional expansion of jurisdiction by the Court over administrative rulemaking, Congress created in the 1970s a series of agency jurisdictional statutes that turned *Abbott* full circle by limiting judicial review to the preenforcement stage. Thus, Congress gave the Court what it appeared to want—early opportunity to review the validity of rules. But Congress, by making the early route exclusive, attempted once again to maintain its power to control the timing of access to the courts as it had successfully done in pre-*Abbott* days.[4]

The prototype statutes contain an explicit preenforcement review "statute of limitations" that restricts appeals from rules to sixty or ninety days after promulgation. This grant of preenforcement judicial review is followed by a section which states that "[a]ction of the Administrator with respect to which review could have been obtained [at the preenforcement stage] shall not be subject to judicial review in civil or criminal proceedings for enforcement."[5] A larger group of statutes provides for time limited preenforcement review, but does not explicitly forbid review at the enforcement stage.[6]

---

[3] 387 U.S. 136 (1967).

[4] Justice Fortas, in his dissent in *Abbott* and Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967), emphasized that the Court had opened "Pandora's box" by permitting "free-wheeling" preenforcement nonstatutory review and suggested that Congress was clearly within its power to limit such review. *Id.* at 176-77. Though Congress gave no hint that it had based its subsequent limitation of enforcement review statutes on this dissent, much in the Fortas opinion certainly supports the course Congress subsequently followed.

Both the explicit and implied limitation of review situations have troubled the courts deeply and as a result have produced confused and often contradictory decisions.[7] Moreover, other rulemaking review statutes, far less explicit in their treatment of preenforcement review, could be affected by the significance attached to the two principal statutory formulations under study.[8] The Supreme Court has so far proceeded cautiously in evaluating the prototype statutes, but addressing the fundamental issues is likely to become necessary.[9] The Administrative Conference of the United States has already stated in a general way its reservations about limiting review to the preenforcement stage.[10] Continuing legislative activity warrants a further study focusing specifically upon the constitutional aspects of forestalling judicial determination of controversies about the validity of rules.

---

[5] The Federal Water Pollution Control Act, §§ 509(b)(1) & (2), 33 U.S.C. §§ 1369(b)(1) & (2) (1976) (90 days). Similar provisions are contained in the Clean Air Act, §§ 307(b)(1) & (2), 42 U.S.C. §§ 7607(b)(1) & (2) (1982) (60 days), and the Noise Control Act, § 16(a), 42 U.S.C. § 4915(a) (1976) (90 days). *See* NRDC v. EPA, 673 F.2d 400, 406 (D.C. Cir. 1982) (labeling the Clean Water Act provision a "ninety day 'statute of limitations' ").

[6] *See, e.g.*, Occupational Safety and Health Act, § 6(f), 29 U.S.C. § 655(f) (1976), which provides that: "Any person who may be adversely affected by a standard . . . may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard." Other examples are collected in Davis, *Judicial Review of Rulemaking: New Patterns and New Problems*, 1981 Duke L.J. 279, 300-05 [hereinafter cited as Davis, *Judicial Review*].

[7] *See, e.g.*, Daniel Int'l Corp. v. OSHRC, 656 F.2d 925 (4th Cir. 1981); Chrysler Corp. v. EPA, 600 F.2d 904 (D.C. Cir. 1979); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d. Cir. 1977).

[8] These statutes either provide for review of rules without any time limits or are silent on the question of review. *See infra* notes 69-72 and accompanying text.

[9] *See* Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978), narrowly construing a provision of the Clean Air Act to avoid the preclusion of enforcement review (and for Justice Powell at least the due process issue such preclusion presented, *id.* at 291). Congress has amended the Clean Air Act to make more difficult the Court's statutory construction avoidance scheme. *See* Clean Air Act, § 307(b)(1), 42 U.S.C. § 7607(b)(1) (Supp. I 1977). *See* 434 U.S. at 305 n.24 (Stevens, J., dissenting). *See generally* T. Schoenbaum, Environmental Policy Law 909-10 (1982).

[10] *See* Administrative Conf. of the United States, Recommendation on Judicial Review Under the Clear Air Act and Federal Water Pollution Control Act (codified at 1 C.F.R. § 305.76-4 (1976)) [hereinafter cited as ACUS Rec. 76-4], suggesting amendments to the Clean Air Act and the Federal Water Pollution Control Act to permit the "validity" of a regulation to be challenged on an enforcement proceeding. In preparing its recommendation, the Conference substantially relied upon the work of its consultant, Professor David Currie. *See* Currie, *Judicial Review Under Federal Pollution Laws*, 62 Iowa L. Rev. 1221, 1254-61 (1977).

CONSTITUTIONAL CONSTRAINTS ON CONGRESSIONAL PRECLUSION OF JUDICIAL REVIEW

No clear guideposts establish the limits on congressional power to preclude review, or drastically to curtail its exercise.[11] A good attempt to set some constitutional "maximum" and "minimum" limits on judicial review was made by the 1941 Attorney General's Report on Administrative Procedure in Government Agencies.[12] The maximum limit prevented a court under article III from exercising legislative powers by substituting its judgment for that of an agency. The minimum limit, also under article III, prevented an agency or other non-article III court from adjudicating without active review by constitutional courts.[13] But the Report conceded that "the exact location of these limits is subject to controversy" and that, between them, "there is a considerable area for legislative discretion in granting or withholding the right of judicial review."[14]

The constitutional source of objections to denial of judicial review comes not only from the judicial power described in article III, but also from the doctrine of separation of powers and the fifth amendment due process clause. These three provisions interrelate to form the limits upon Congress' power to restrict judicial review of agency decisionmaking. To measure them one has to look at some of the attempts to limit judicial review over the years.

---

[11] Henry Hart's classic formulation is that congressional exceptions to federal court jurisdiction must not "destroy the essential role of the Supreme Court in the constitutional plan." Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1364-65 (1953). In the present context, the inquiry, phrased in Professor Hart's terms, is when is judicial review over federal administrative rules and their related enforcement proceeding part of the Court's essential role. This focus on the Court's essential role forces one to distill judicial review down to the part that is basic to constitutional review.

[12] United States Attorney General's Comm. on Admin. Procedure, S. Doc. No. 8, 77th Cong., 1st Sess. (1941), *reprinted in* Administrative Procedure in Government Agencies (U. Va. Press reprint 1968) [hereinafter cited as Admin. Proc. in Gov't Agencies].

[13] *Id.* at 79-80. This minimum limit received dramatic illumination in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (1982), when the Court held that the Bankruptcy Reform Act of 1978 unconstitutionally delegated article III judicial business to article I bankruptcy courts.

[14] Admin. Proc. in Gov't Agencies, *supra* note 12, at 79-80.

Congressional Preclusion of Review

Congress and the Court have long played a cat and mouse game over preclusion of review of administrative action. Clearly the Court will retain the jurisdiction to decide whether a particular preclusion statute is effective,[15] but equally clearly the Court will frequently accept the limitations on review Congress seeks to impose. The classic situations have been those involving the draft, exclusion of aliens, and the Veterans Administration,[16] but statutory preclusion of review has been upheld in many other contexts.[17] The proposition these situations pose is that judicial review may be severely circumscribed or terminated altogether when there are compelling countervailing interests in swift and final administrative resolution.

These statutes have been honored by the Court only to a point, however. When the issue sought to be foreclosed from judicial consideration is of constitutional magnitude, the Court has often strained to protect its fundamental reviewing role even while nodding in the direction of congressional power. To avoid a constitutional confrontation, the Court assumes that Congress did not intend a preclusion of review provision to deny the Court the power of constitutional review. In *Johnson v. Robison*,[18] for example, the Court held that an equal protection claim of a conscientious objector denied benefits was directed not at judicial review of the Veterans Administration, which would be barred by statute, but at constitutional review of Congress' power to enact discriminatory legislation, which Congress would not have meant to foreclose. Similarly, other courts have interpreted preclusion of review statutes as not aimed at preventing judicial consideration of claims asserted under the due process clause.[19] As a result, due process has become a principal tool of constitutional review of administrative action, and it has been employed by the courts in a variety of ways to secure review in situations where statutes ostensibly preclude it.[20]

---

[15] *See* Sager, *supra* note 1, at 26-27.

[16] 50 U.S.C. app. § 460(b)(3) (1976) (selective service system classification review limited to no basis on fact); 8 U.S.C. § 1105a(b) (1976) (review of INS exclusion order limited to habeas corpus proceedings); 38 U.S.C. § 211(a) (1976) (VA determination nonreviewable).

[17] *See, e.g.*, Micronesian Claims Act of 1971, 50 U.S.C. app. § 2020 (1976). Forty examples of statutory preclusions of review are collected in Sedivic, Congressional and Judicial Limitations on the Reviewability of Certain Administrative Decisions Taken Pursuant to Authority Delegated by Congress, at Appendix (Oct., 1980) (unpublished ACUS paper).

[18] 415 U.S. 361 (1974). *But see* Weinberger v. Salfi, 422 U.S. 749 (1975) (Court precluded even constitutional review under 42 U.S.C. § 405(h) on the grounds that, unlike the VA statute, other jurisdictional avenues were statutorily available under the Social Security Act).

By drawing a distinction between ordinary judicial review and review premised on the Constitution and by implying Congress' acquiesence in the distinction, the Court has preserved its role in the constitutional plan, allowed Congress some leeway to shape its priorities, and avoided confrontation with Congress over the scope of article III.[21] A dual standard of review has emerged: the Court will respect Congress' decision to preclude judicial review so long as Congress has respected the Court's role in the constitutional plan. Indeed, once the Court is sure of its ground, it is even occasionally willing to imply congressional preclusion of review.[22]

Assertion of a dual system of review, however, only begins the inquiry; obviously the more formidable task is to identify the parameters of ordinary judicial review and judicial review with constitutional overtones. As part of that analysis, however, it must be considered whether congressional alternatives to strict preclusion of judicial review should or do make a difference in the Court's determination to assert its constitutional review role.

---

[19] In Ralpho v. Bell, 569 F.2d 607, 625-26 (D.C. Cir. 1977), the court held that the preclusion of review provision of the Micronesian Claims Act of 1971, 50 U.S.C. app. § 2020 (1976), "prohibits review in the usual case," but "does not forestall judicial cognizance of [com]plaints that the Commission has disregarded unambiguous statutory directives or . . . constitutional commands." A comparable due process approach has occurred in VA preclusion cases as well. *See, e.g.*, Plato v. Roudebush, 397 F. Supp. 1295 (D.C. Md. 1975); Holley v. United States, 352 F. Supp. 175 (S.D. Ohio 1972), *aff'd*, 477 F.2d 600 (6th Cir. 1973).

[20] The due process inquiry is usually related to procedures provided in administrative adjudication, but challenges to administrative action as *ultra vires*, usually thought to be of less than constitutional stature, recently have been held to be due process based. *See* Wayne State Univ. v. Cleland, 440 F. Supp. 806 (E.D. Mich. 1977), *aff'd in part*, 590 F.2d 627 (6th Cir. 1978); *infra* text accompanying notes 73-76.

[21] Where constitutional review is not at stake, the Court has often been generous in honoring preclusion of judicial review statutes. *See* Briscoe v. Bell, 432 U.S. 404 (1977), *vacating* Briscoe v. Levi, 535 F.2d 1259 (D.C. Cir. 1976).

[22] *See* Morris v. Gressette, 432 U.S. 491 (1977) (implying preclusion of review of a decision by the Attorney General under the Voting Rights Act); Switchmen's Union v. National Mediation Bd., 320 U.S. 297 (1943) (NLRB and courts without jurisdiction to review mediation board's decision, because Congress wished to avoid "dragging out" the controversy).

Congressional Limitations on Review

Congress is not unaware of the due process implications of its actions and therefore it has occasionally compromised between wide-open judicial review and absolute preclusion of judicial review by limiting review narrowly in time. This compromise is of course the situation with the Clean Air Act and related statutes that are the focus of this study.

This compromise is drawn from one of the classic congressional attempts to expedite review during World War II. Under the Emergency Price Control Act of 1942, Congress provided that wartime price regulations could be challenged only by an action in the Emergency Court of Appeals brought within sixty days after the regulations were promulgated.[23] Yakus, who failed to avail himself of the statutory review procedure, was charged in a criminal enforcement proceeding with violating the maximum price regulations, and he sought to challenge their issuance in that proceeding. In *Yakus v. United States*[24] his challenge was held barred by the limitation of review provision on the ground that it provided an "adequate" alternative to conventional judicial review.[25] The continued vitality of this decision has been questioned by commentators[26] and recently by a member of the Court itself[27] because of its wartime emergency context. Yet it is difficult to ignore the case, because it serves as the obvious model for the prototype statutes under study. One therefore is compelled to study *Yakus* carefully to see if it can be sustained in a broader context.

Admittedly, Justice Rutledge's emphatic dissent in *Yakus* makes one uneasy about unhesitatingly applying the case to the present controversy. He phrased the issue for decision as follows:

---

[23] Emergency Price Control Act, § 204(d), 50 U.S.C. § 924 (1944) (repealed 1947).

[24] 321 U.S. 414 (1944).

[25] *Id.* at 446.

[26] *See* Currie, *supra* note 10, at 1255-57 (noting that Congress repealed the controversial legislation in 1947).

[27] *See* Adamo Wrecking Co. v. United States, 434 U.S. 275, 290-91 (1978) (Powell, J., concurring); Harrison v. PPG Indus., 446 U.S. 578, 594 (1980) (Powell, J., concurring).

"The question narrows therefore to the inquiry, in what circumstances and under what conditions may Congress, by offering the individual a single chance to challenge a law or an order, foreclose for him all further opportunity to question it, though requiring the courts to enforce it by criminal processes?"[28] Two aspects of the case particularly troubled Justice Rutledge. Criminal proceedings and sanctions could be imposed while appeal of the regulation's validity was pending in the Emergency Court of Appeals. And as he read the majority opinion, it foreclosed review of constitutional claims in the criminal enforcement proceeding.[29] The majority opinion in *Yakus* was written by Chief Justice Stone. A close reading of his opinion shows that he expressed reservations for the Court that appeared to meet Justice Rutledge's objections. The Chief Justice stated:

> We have no occasion to decide whether one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face. Nor do we consider whether one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure, may thus be deprived of the defense that the regulation is invalid.[30]

Thus to some extent Justice Rutledge's concerns were addressed, albeit not to his satisfaction, in the majority opinion itself.

Moreover, in 1944 Congress amended the Emergency Price Control Act (EPCA) to permit appeals to the Emergency Court of Appeals from enforcement proceedings when findings showed a reasonable and substantial excuse for failing to file a protest against the underlying regulation.[31] This "subsequent history" provides a greater assurance that *Yakus* would be accepted today.[32]

---

[28] 321 U.S. at 471.

[29] *See. id.* at 475-76, 478-79.

[30] *Id.* at 446-47.

[31] *See* Hyman & Nathanson, *Judicial Review of Price Control: The Battle of the Meat Regulations*, 42 Ill. L. Rev. 584, 623-24 (1947).

[32] Consider Professor Sager's recent analysis of *Yakus*: "The Court avoided possible constitutional difficulties when it construed the Act to permit criminal defendants to challenge the validity of the Act itself. *Yakus*, 321 U.S. at 429-30. The worst of the Act's difficulties were thus avoided." Sager, *supra* note 1, at 19 n.6. This analysis leaves unaddressed, however, Justice Rutledge's dissenting point that "[c]learly Congress could not

Yakus, read with Chief Justice Stone's reservations and the 1944 amendment, should not be lightly dismissed. First, the reason the EPCA was repealed in 1947 was not, as some commentators have stressed,[33] that Congress believed it to be an aberrational and perhaps regrettable exercise. The primary and obvious reason was that the war was over and price control legislation was no longer needed. If Congress felt embarrassed by the EPCA solution it probably would not have added a sentence to the Administrative Procedure Act in 1946 (the year before it repealed the EPCA) that endorsed the same limitation of enforcement review scheme for agencies generally.[34]

Second, the regulatory problem Congress sought to deal with in a special way by the EPCA solution is not limited solely to wartime price administration. There the difficulty was to achieve a fast, final, and uniform resolution of a national standard for price control: hence, the centralized court (Emergency Court of Appeals) and the short time for review of regulations. But conditions that require such limited review frequently occur in our society in non-wartime situations.[35]

Thus, the narrow enforcement review provisions of the EPCA have been emulated by Congress in other contexts. In fact, if one takes the prototype statutes into account, it is a fair inference that Congress has regularly employed the technique of limited judicial review as a method of expediting important decisions. A good recent example is the Trans-Alaska Pipeline Authorization Act, which reads in relevant part:

> [T]he actions of the Federal officers concerning the issuance of the necessary rights-of-way, permits, leases, and other authorizations for construction and initial operation at full capacity of

---

require judicial enforcement of an unconstitutional statute. The same is true of an unconstitutional regulation." 321 U.S. at 469 (Rutledge, J., dissenting). *See* J. Choper, Judicial Review and the National Political Process 390-92 (1980).

[33] *See* Currie, *supra* note 10, at 1255-57.

[34] Section 703 of the APA provides in its last sentence: "Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." 5 U.S.C. § 703 (1976). The legislative history of the APA leaves little doubt that this sentence, which incorporates the "adequacy" standard of *Yakus*, was added to account for the possible reappearance of the EPCA judicial review solution in other statutes. *See* Attorney General's Manual on the Administrative Procedure Act 99 (1947).

[35] *See, e.g.*, Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971).

> said pipeline system shall not be subject to judicial review under any law except that claims alleging the invalidity of this section may be brought within sixty days following November 16, 1973, and claims alleging that an action will deny rights under the Constitution of the United States, or that the action is beyond the scope of authority conferred by this chapter, may be brought within sixty days following the date of such action. A claim shall be barred unless a complaint is filed within the time specified.[36]

This draconian provision for limiting judicial and constitutional review has so far gone unchallenged,[37] although one has to wonder what would happen if a serious constitutional claim were raised after the sixty days had expired.[38]

These examples indicate that time limited exclusive review provisions, at least in circumstances where Congress has made findings of the need for expedition, uniformity, and finality, are acceptable methods for rationing access to the courts. Moreover, they are distinguishable from preclusion of review statutes precisely because of the limited opportunity for judicial review. Undoubtedly, in the total preclusion of review situation, the Court is at greater pains to preserve its constitutional role. Thus the Court will more readily defer to Congress even on constitutional matters where there is a statute limiting rather than precluding rulemaking review, although Chief Justice Stone's reservations in the *Yakus* case caution against a total denial of subsequent constitutional review.[39] Presumably, however, one is on safe ground in assuming that those issues on judicial review that may be subject to total preclusion should certainly be at least equally subject to narrowly circumscribed review.

---

[36] 43 U.S.C. § 1652(d) (1976).

[37] *Cf.* Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 638-39 n.17 (1978) (construing preclusion of review of suspension orders so as to exclude challenges to ICC rulemaking authority).

[38] *See* Note, *Congressional Power Over State and Federal Court Jurisdiction: The Hill-Burton and Trans-Alaska Pipeline Examples*, 49 N.Y.U. L. Rev. 131 (1974).

[39] Consider Califano v. Sanders, 430 U.S. 99, 109 (1977), where the Court upheld a denial of jurisdiction to challenge an action of the Secretary because of the 60-day limitation of section 205(g) of the Social Security Act. The Court observed, however, that this was not one of those "rare instances" when "the claimants challenged the Secretary's decision on constitutional grounds." The Court restated the "well-established principle that when constitutional questions are at issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence." (citing Weinberger v. Salfi, 422 U.S. 749, 762 (1975); quoting Johnson v. Robison, 415 U.S. 361, 366-67 (1974)).

THE DIFFERENCES BETWEEN CONSTITUTIONAL REVIEW AND ORDINARY JUDICIAL REVIEW IN THE RULEMAKING CONTEXT

Isolating the constitutional content of judicial review of administrative action to determine whether and to what extent to give effect to preclusion or limitation of review statutes is no easy matter. Even the courts themselves occasionally take opposing views on what kind of review is or is not mandated by the Constitution. Indeed, the Chief Justice of the United States has taken the extraordinary step of recommending that Congress explicitly deny judicial review over a federal administrative action.[40] This action led the Court to introduce, in cryptic fashion, the distinction between review premised on the Constitution and ordinary judicial review.[41] The distinction, especially as it relates to review of rulemaking, lies at the heart of this study.

If a substantive provision of the Constitution, such as the first amendment or the equal protection clause, has been violated, then review is commanded as an element of due process even in the face of congressional restrictions.[42] In these circumstances the Court's primary role as interpreter of the Constitution is being challenged and the justices are unlikely to allow the challenge to remain unmet. As Justice Brandeis said: "[U]nder certain circumstances, the constitutional requirement of due process is a requirement of judicial process."[43]

---

[40] In the famous Three Sisters Bridge litigation, the District of Columbia lower federal courts kept enjoining construction of the bridge because of the failure of the Secretary of Transportation to comply with various procedural requirements even after Congress had passed a statute ostensibly precluding review. *See* 23 U.S.C. § 23(b) (1968); D.C. Fed'n of Civic Ass'ns, Inc. v. Volpe, 434 F.2d 436 (D.C. Cir. 1970).

[41] In a concurrence to the denial of certiorari in the Three Sisters Bridge case (in order not further to delay the project), Chief Justice Burger wrote (in part): "In these circumstances Congress may, of course, take any further legislative action it deems necessary to make unmistakably clear its intentions with respect to the project, even to the point of limiting or prohibiting judicial review of its directives in this respect." Volpe v. D.C. Fed'n of Civic Ass'ns, Inc., 405 U.S. 1030, 1031 (1972). The last three words were added after the unofficial version was published (92 S. Ct. 1290, 1291 (1972)) (Burger, C.J., concurring) apparently to avoid any implication that the Court was suggesting that constitutional review might be eliminated. *See* Strong, *Three Little Words and What They Didn't Seem to Mean*, 59 A.B.A. J. 29 (1973).

[42] This is the message of Johnson v. Robison, 415 U.S. 361 (1974). *See also* Stewart & Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1195, 1250 (1982).

[43] Crowell v. Benson, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting).

The due process clause can also be invoked to mandate review of decisionmaking procedures. Here constitutional review encompasses the requirement of procedural regularity. Thus, for example, a criminal record totally devoid of evidentiary support would be upset on review because it violates the procedural minimum assured by due process.[44] But this standard of constitutional review is harder to apply in the administrative setting, especially where the subject of review is an administrative rule.

Constitutional Rights in Administrative Procedures

The due process clause ensures that some administrative decisions bearing on liberty and property are subject to constitutional review to assess whether the procedure that underlies them comports with due process.[45]

The best known statement of the courts' role in procedural due process review is again that of Justice Brandeis:

> The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality. But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court. If it did, the power of courts to set aside findings of fact by an administrative tribunal would be broader than their power to set aside a jury's verdict. The Constitution contains no such command.[46]

---

[44] *See* Vachon v. New Hampshire, 414 U.S. 478 (1974); Harris v. United States, 404 U.S. 1232 (1971); Thompson v. Louisville, 362 U.S. 199 (1960).

[45] "[W]hen a person is the object of an administrative order which will be enforced by a writ levying upon his property or person, he is at some point entitled to a judicial test of legality." L. Jaffe, Judicial Review of Administrative Action 384 (1965) (emphasis omitted). The problem of deciding upon the content of due process procedures becomes more complicated when so-called "new property" rights are at stake both because of the difficulty in defining liberty and property and because of the balancing process engaged in by the court to define the nature of the procedures to be employed. *See* Mathews v. Eldridge, 424 U.S. 319 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970); Ralpho v. Bell, 569 F.2d 607 (D.C. Cir. 1977); Stewart & Sunstein, *supra* note 42, at 1266-67; *see also* L. Jaffe, *supra*, at 386-88.

[46] St. Joseph Stock Yards, Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring). *See also* Force, *Administrative Adjudication of Traffic Violations Con-*

The crux of this formulation is that when an administrative proceeding adjudicates facts its procedural regularity must be reviewable under the due process clause. This review would encompass questions like adequacy of notice, hearing procedures, creation of a record for decision, and neutrality of the decisionmakers.

Conversely, when the agency is not adjudicating in the traditional sense, there are no comparable constitutional constraints on the regularity of procedures. This lack of traditional constraints has been the case with administrative rulemaking.[47] It is also the case with other administrative actions that do not jeopardize even broadly defined individual liberty or property interests, such as informal administrative decisions on the expenditure of funds.[48] In these contexts—particularly rulemaking—there is at present no constitutional right to review the procedures employed.[49] As a result, a participant dissatisfied with the procedures provided in an informal rulemaking proceeding will have only statutory forms of review to rely on and these forms of review may be precluded by Congress. If Congress does limit judicial review of rules, as it has done in the prototype statutes herein discussed, there is little of constitutional moment in that decision from the procedural perspective.

---

fronts the Doctrine of Separation of Powers, 49 Tul. L. Rev. 84, 97-99 (1974).

[47] *See* Opp Cotton Mills, Inc. v. Administrator of Wage & Hour Div., 312 U.S. 126 (1941); Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915). *But see infra* note 49 and accompanying text.

[48] The kind of administrative action engaged in by Secretary Volpe in the Three Sisters Bridge project is of this nature. *See supra* notes 40-41. Other examples would include the kind of informal action engaged in by the Secretary of Transportation approving highway funds in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). *But see* D.C. Fed'n of Civic Ass'ns, Inc. v. Volpe, 434 F.2d 436, 439-44 (D.C. Cir. 1970) (Judge Wright discussing whether any constitutional rights were at stake). It should be recalled that shortly after Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), established the primacy of constitutional review, Congress legalized the construction of a bridge the Court had declared illegal under prior law. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 431-32 (1856). *See* L. Tribe, American Constitutional Law § 3-5, at 39-40 (1978).

[49] Some cases in the public housing context have raised procedural due process issues by blurring the distinction between rulemaking and adjudication, but the idea of a unitary procedure for informal adjudication has not been generally accepted. *See* Thompson v. Washington, 497 F.2d 626 (D.C. Cir. 1973); *see also* Verkuil, *The Emerging Concept of Administrative Procedure*, 78 Colum. L. Rev. 258, 291-92 (1978).

The Constitutional Content of Judicial Review of Rules

Assuming then that there is no need to worry about constitutional review of the procedural format of rulemaking, the question remains what, if any, constitutional rights are there to review the rationality of the rule itself, once it is promulgated. Although the days of the constitutional and jurisdictional fact doctrine of *Crowell v. Benson*[50] and related cases have passed, these cases are still the place to begin in attempting to identify the scope of review mandated by due process. By requiring *de novo* review of facts supporting jurisdiction and deprivations of liberty and property, *Crowell* came close to subjecting all administrative decisions to constitutional review, a point Justice Brandeis made in dissent.[51] But *Crowell* is best explained in the context of its times: the substantive due process era.[52] Constitutional fact review was a natural outcome for a Court that utilized substantive due process and the nondelegation doctrine as a means of controlling the growth of administrative agencies. Once that era ended, much of the strict constitutional scrutiny accorded administrative decisions ended with it.[53]

Today the Court seems quite comfortable with the usual forms of review Congress provides under the APA or organic legislation, and no question arises over the adequacy of that review for constitutional purposes. Moreover, the APA sets limits on its scope of review formulae that distinguish between constitutional and judicial review in a useful way.[54] Thus section 706(2)(B) authorizes a reviewing court to set aside agency action found to be "contrary to constitutional right, power, privilege, or immunity,"[55] while the other sections deal with review of action that is arbitrary and capricious, in excess or short of statutory jurisdiction, without required procedure, or unsupported by substantial evidence.[56]

---

[50] 285 U.S. 22 (1932). The present relevance of *Crowell* was emphasized recently in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (1982), where the Court relied on *Crowell*'s "recognition of a critical difference between rights created by federal statute and rights recognized by the Constitution," *id.* at 2877-78, in deciding that Congress' establishment of expansive bankruptcy court jurisdiction over bankruptcy claims violated article III. The *Northern Pipeline* Court stated that *Crowell*'s precise holding concerning constitutional and jurisdictional facts had been undermined, but not its general principles of constitutional review. *Id.* at 2877. *See also* Strong, *The Persistent Doctrine of Constitutional Fact*, 46 N.C.L. Rev. 223 (1968).

[51] 285 U.S. at 86-87.

[52] *See supra* note 50.

[53] *See* FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944).

[54] 5 U.S.C. § 706(2) (1976).

[55] *Id.* § 706(2)(B).

Although under the APA plan each of these provisions may be rendered inapplicable,[57] the provisions create an effective way for differentiating between constitutional review and statutory review. The reviewing court's power under section 706(2)(B) is part of the APA's design to catalogue the standards of review existing at the time it was enacted.[58] Since section 706(2)(B) deals with constitutional review, it suggests that the other scope of review provisions (or most other variations created by the common law of judicial review[59]) are beyond the level of review mandated by the Constitution.

This analysis further suggests that there may be a standard of constitutional review of the validity of rules that is separate from—and presumably narrower than—the arbitrary and capricious review provision usually applicable to rulemaking review. But the content of this constitutional review of rules, required in the event of a statutory nonreviewability provision nullifying the arbitrary and capricious standard, is not articulated in the APA. One must look elsewhere for the content of constitutional review. Such review may be much like the kind of review it most emulates: the constitutional review of statutes.[60] This would mean that rationality review, which upholds statutes if there is any reason that may be inferred from their issuance, is all that constitutional rulemaking review requires. Justice Brandeis phrased this standard of review for a unanimous Court in *Pacific States Box & Basket Co. v. White*, as follows: "Where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies."[61] The fact that Brandeis' *Pacific States Box* formula for review has been rejected as too narrow in recent APA review cases only reinforces its appropriateness as the standard for constitutional review of rules.

---

[56] *Id.* §§ 706(2)(A)-(E). Subsection (F) limits *de novo* review to situations in which it is called for by statute, thereby impliedly rejecting the *Crowell* approach to constitutional review.

[57] *Id.* Section 701 states that the judicial review chapter applies, except for statutes that preclude judicial review or agency action that is committed to agency discretion by law.

[58] It is difficult to think of any scope of review formulation that was left out at the time the APA was drafted. In drafting § 706 (§ 10(e) of the original APA), Congress relied upon a careful outline of the judicial review alternatives that was provided in the influential 1941 Attorney General's Report. *See* Admin. Proc. in Gov't Agencies, *supra* note 12, at 83-92.

[59] The "hard look" doctrine is one such common law doctrine of review. *See* W. Gellhorn, C. Byse & P. Strauss, Administrative Law—Cases and Comments 343-50 (1979); Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. Pa. L. Rev. 509 (1974); Stewart & Sunstein, *supra* note 42, at 1253-55.

[60] Justice Rutledge drew a similiar conclusion in his *Yakus* dissent, 321 U.S. at 469 (Rutledge, J., dissenting), *quoted supra* at note 32.

One might ask what difference a substitution of verbal formulae for review of rules actually makes. The fact is, however, that the light form of constitutional review scrutiny has important consequences that distinguish it from the arbitrary and capricious standard.[62] The critical difference is that it dispenses with the obligation to determine if there is factual support for the rule in the rulemaking file. As a result, this kind of review is significantly less demanding than arbitrary and capricious or substantial evidence review as these terms have come to be interpreted.[63]

Another aspect of constitutional review of rules involves the determination whether they (like statutes) are properly applied to a respondent in an enforcement proceeding. In the statutory context, constitutional review will lie where there is no basis in fact for applying the statute to a particular respondent. The same kind of review should obtain over rules as a matter of due process protection.[64] There is no reason to accept misapplication of a rule to a respondent's conduct in circumstances where one would not accept comparable misapplication of a statute.

---

[61] 296 U.S. 176, 186 (1935).

[62] Professor Davis has recently stated that the Brandeis formulation in *Pacific States Box* may have been an accurate description of judicial review of rules until 1970. K. Davis, Administrative Law Treatise § 29.00-1, at 529 (2d ed. Supp. 1982). Since then, of course, the arbitrary and capricious standard has been read to impose a record requirement on rulemaking. But this still leaves *Pacific States Box* as an adequate description for constitutional review of rules, since it equates review of rules with review of statutes. *See* L. Tribe, *supra* note 48, § 8-7.

[63] It may be difficult to accept that an arbitrary and capricious rule could still be constitutional, but it should be remembered that the arbitrary and capricious standard has become one that demands factual support, much like substantial evidence review. *See* Associated Indus. v. Department of Labor, 487 F.2d 342 (2d Cir. 1973) (Friendly, J.). Also it is possible conceptually for an arbitrary rule to be committed to agency discretion. *See* K. Davis, *supra* note 62, § 28.16.

[64] *See* Estep v. United States, 327 U.S. 114 (1946) (permitting a defendant in a criminal prosecution to attack a "final" draft classification decision on the ground that there was "no basis in fact" for the decision and therefore it was outside the draft

As a practical matter, however, this kind of "as applied" challenge in enforcement proceedings is rarely couched in constitutional terms. In most situations a court will simply refuse to apply a rule to a respondent if there is substantial doubt as to its intended reach.[65] Occasionally, a court will utilize this technique as a method for avoiding the application of a preclusion of review provision. In *Adamo Wrecking Co. v. United States*,[66] the Court found that the statutory enforcement preclusion provision reached only "emissions standards" but not "work practice standards" and that respondent's conduct in fact violated only the latter kind of standard.[67]

Undeniably, the use of "as applied" challenges to rules opens up the widest avenue for challenge in enforcement proceedings and creates the greatest potential for disrupting the agency's enforcement strategy.[68] Nevertheless, as a jurisprudential matter, there is little doubt that such challenges, especially in criminal proceedings, but probably more generally, are constitutionally necessary.[69]

If statutes preclude review of rules entirely there is a residuum of constitutional review that cannot be erased, despite lan-

---

board's jurisdiction).

[65] For example, in Phelps Dodge Corp. v. Federal Mine Safety and Health Review Comm'n, 681 F.2d 1189 (9th Cir. 1982), the court simply refused to apply a rule to respondent in an enforcement proceeding, because in the court's view the rule failed to give respondent "fair warning" that the challenged conduct was prohibited.

[66] 434 U.S. 275 (1978).

[67] *Id.* at 286-87.

[68] *See, e.g.*, KCMC, Inc. v. FCC, 600 F.2d 546 (D.C. Cir. 1979) (interpreting an FCC divestiture regulation to exclude, on its face, application to respondent). Justice Rehnquist in his *Adamo Wrecking* opinion acknowledged that "district courts will be importuned, under the guise of making a determination as to whether a regulation is [properly applied to the respondent] to engage in judicial review in a manner that is precluded by [the Clean Air] Act." His only response was: "This they may not do." 434 U.S. at 285.

[69] In *Adamo Wrecking*, the Court emphasized the importance of construing the application of the enforcement review preclusion statute carefully because the proceedings were criminal in nature. *See* 434 U.S. at 283-84. It should be recalled that Justice Rutledge premised much of his dissent in *Yakus* upon the criminal nature of the enforcement proceedings. 321 U.S. at 468 (Rutledge, J., dissenting). He was much less concerned about the due process issues surrounding the EPCA when civil proceedings were involved. *See* Bowles v. Willingham, 321 U.S. 503, 525-26 (1944) (Rutledge, J., concurring).

guage in the APA or organic legislation. This is the message of *Johnson v. Robison* and related cases that interpret congressional enactments to imply substantive constitutional review despite what appears to be clear preclusion language. Moreover, the courts will continue to permit respondents to question the applicability of a rule to their conduct as an aspect of procedural due process, whether or not such challenges are phrased in due process terms.

When the situation shifts from absolute preclusion to limitation of review to the preenforcement stage, however, a strict reading of *Yakus* suggests that even the constitutional component of judicial review can be eliminated, so long as the opportunity to raise constitutional issues at the preenforcement stage is adequate. However, there is resistance—including reservations contained in *Yakus* itself and reflected in subsequent amendments to the EPCA—to the elimination of constitutional review as herein defined at the enforcement stage. But one must concede that Congress has on occasion successfully limited the time frame or the forum within which constitutional issues can be raised.[70] The most that can be said is that statutes that seek drastically to limit or channel constitutional review of rules in enforcement proceedings bear a heavy burden of justification before the Court.

What then has been gained by this exercise of delineating between constitutional review and ordinary judicial review? A good starting point is the following dictum by Justice Rehnquist in *Adamo Wrecking*:

> The narrow inquiry to be addressed by the court in a criminal prosecution is not whether the Administrator has complied with appropriate procedures in promulgating the regulation in question, or whether the particular regulation is arbitrary, capricious, or supported by the administrative record. Nor is the court to pursue any of the other familiar inquiries which arise in the course of an administrative review proceeding. The question is only whether the regulation which the defendant is alleged to have violated is on its face an "emission standard"

---

[70] *See* the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1652(d) (1976), *reprinted supra* at text accompanying note 36. *See also* American Ass'n of Councils of Medical Staffs of Private Hosps., Inc. v. Califano, 575 F.2d 1367 (5th Cir. 1978) (finding both statutory and constitutional claims foreclosed by § 405(h) of the Social Security Act), *cert. denied*, 439 U.S. 1114 (1979).

> within the broad limits of the congressional meaning of that term.[71]

As this language suggests, limitation of judicial review of rules to the preenforcement stage will be effective to deny procedural review and substantive judicial review since, under the analysis suggested here, no constitutional claims are presented by those aspects of review. But challenges to a rule or statutory term "as applied" to a defendant will survive any attempt to preclude them for reasons that are due process based. *Adamo Wrecking* is not a constitutional review case, but Justice Rehnquist's analysis suggests that constitutional issues will remain in the background only so long as the Court has the flexibility to construe the scope and application of statutory terms so as to avoid direct confrontation with Congress over the scope of judicial power.

The Status of Ultra Vires *and Other Legal Challenges to Rules*

There remains a troubling middle ground relating to the survival of purely legal claims in the preclusion or limitation context. Certainly some legal claims are not of constitutional stature. The distinctions between fact and law and the application of fact to law are sufficiently elusive concepts that one would expect it to matter greatly how they were treated in the preclusion context.[72] These claims would ordinarily be foreclosed by a preclusion or limitation of review provision. Other legal issues, however, though still strictly speaking not of constitutional magnitude, nonetheless have been construed by some courts to survive attempts to preclude them. This result is most notable with *ultra vires* challenges.

There is no question today that most courts would hold challenges to an administrator's statutory authority to promulgate regulations to be nonconstitutional.[73] But some courts have hinted that such challenges may have a constitutional base and they have held them to be outside the scope of preclusion statutes.[74] This approach can only be explained as a revival of the now repudiated constitutional and jurisdictional fact doctrine of *Crowell v. Benson*.[75] If it occurs generally, Congress will be frustrated in its attempts to limit judicial review of rules. The line between legal and constitutional issues is a helpful one precisely because it gives Congress a say in allocating access to the courts. If it is ignored, then few if any legal issues may be foreclosed. This message has not been lost on some judges who have resisted a return to a constitutional and jurisdictional fact approach by usefully applying the distinction drawn here between constitutional and ordinary judicial review.[76]

---

[71] 434 U.S. at 285.

[72] *See generally* NLRB v. Marcus Trucking Co., 286 F.2d 583 (2d Cir. 1961) (Friendly, J.); L. Jaffe, *supra* note 45, at 546-50.

[73] *See, e.g.*, Kirkhuff v. Nimmo, 683 F.2d 544 (D.C. Cir. 1982); Carter v. Cleland, 643 F.2d 1, 7 (D.C. Cir. 1980).

[74] *See, e.g.*, Wayne State Univ. v. Cleland, 590 F.2d 627 (6th Cir. 1978); *accord* Evergreen State College v. Cleland, 621 F.2d 1002 (9th Cir. 1980); University of Md. v.

But the fact that some, perhaps many, legal issues involving rules ought not to be reviewable in the context of a preclusion or limitation of review statute does not fully allay concern about the complete elimination of such challenges. Since *ultra vires* challenges are not viewed as constitutional, they do not fit within the distinction proposed here between constitutional review and ordinary judicial review. Yet one senses that such legal challenges, which go directly to the agency's authority from Congress to enforce a rule against a particular respondent, ought not to be disregarded lightly in enforcement proceedings.

One way to preserve *ultra vires* challenges is to fit them into the constitutional side of the system here proposed. That is not an impossible task, but it requires some creative reasoning by analogy. The constitutional equivalent to *ultra vires* review of rulemaking authority is the nondelegation doctrine, which prohibits Congress from granting agencies unlimited legislative power. Separation of powers analysis asks the question whether Congress impermissibly gave away its legislative power when it transferred authority to an administrative agency.[77] The consti-

---

Cleland, 621 F.2d 98 (4th Cir. 1980); Merged Area X (Educ.) v. Cleland, 604 F.2d 1075 (8th Cir. 1979).

[75] *See supra* note 50.

[76] *See* Carter v. Cleland, 643 F.2d 1, 5 (D.C. Cir. 1980) (Mikva, J.) (utilizing the term "constitutional review" as employed in this article).

[77] In the legislative history to the APA, Congress phrased its nondelegation concerns in the following language:

> It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

S. Doc. No. 248, Legislative History to the Administrative Procedure Act, 79th Cong., 2d tutionally equivalent question the Court asks in rulemaking is whether the administrator in promulgating a rule acted clearly outside the limits imposed by Congress.[78] This analysis amounts to a sub-nondelegation doctrine, which ensures that Congress' legislative power, presumably satisfactorily delegated initially, is not redelegated beyond its intended limits. Since rules have the effect of legislation,[79] the constitutional concern with the exercise of rulemaking power becomes a variant on the concern historically expressed over the exercise of legislative power.

This analysis only serves to suggest that *ultra vires* challenges, even if viewed as legal rather than constitutional, raise significant issues that may be worth preserving in the face of preclusion or limitation provisions. It may be wise, therefore, to leave such challenges open unless Congress takes the precise step of specifically declaring them closed in a particular preclusion or limitation of review provision. In that event it would be up to the court whether it wants to make the connection between the nondelegation doctrine and *ultra vires* so as to preserve such issues from statutory preclusion.

Summary

The residual constitutional content of review of rules should contain only these components: substantive rationality review and review as applied to the particular respondent. Other legal questions not rising to constitutional levels should be precluded if congressional intent is to be respected. *Ultra vires* issues, however, are of a magnitude close enough to constitutional levels that their foreclosure ought only to be accepted when Congress has specifically made that determination. These propositions can best be demonstrated by application to the prototype limitation of review statutes here under study.

APPLICATION OF CONSTITUTIONAL REVIEW PRINCIPLES TO STATUTES LIMITING ENFORCEMENT REVIEW

Four statutory formulations could be interpreted as limiting review and thereby raising the constitutional review issues ex-

---

Sess. 275 (1946).

[78] As a practical matter this becomes an inquiry similar to the excess of statutory jurisdiction standard outlined in 5 U.S.C. § 706(2)(c) (1976).

[79] *See* Admin. Proc. in Gov't Agencies, *supra* note 12, at 100.

plored above. Two of these possibilities are relatively remote ones; the other two are the subject of this article: time limited preenforcement review statutes with and without enforcement preclusion language. The less complicated situations are those in which Congress either grants an agency rulemaking power but makes no reference to judicial review or grants rulemaking power but provides for judicial review without any time or subject limitations.[80] In these cases, the broad presumption of judicial review expressed in the APA and cases like *Abbott Laboratories*[81] would probably rebut any argument that limitation of review to the preenforcement stage should be implied.[82] Courts would most likely hold that limitations on judicial review are the exception and they must be established by statutory provisions or clear expressions of congressional intent.[83]

The two central formulations present problems of incorporating the constitutional limitations on preclusion of judicial review at the enforcement stage raised in the previous section. Since they differ significantly in design, they must be analyzed separately.

Statutes That Explicitly Deny Enforcement Review

Under the Clean Air Act, the Clean Water Act, and the

---

[80] *See* Davis, *Judicial Review, supra* note 6, at 297-99 (collecting statutes with these characteristics). These kinds of statutes create knotty problems of judicial review if the rules are challenged for procedural flaws long after they were promulgated. The question raised is whether, assuming the now general availability of preenforcement review, such later review ought to be foreclosed or limited so as not to upset settled expectations about the rule's validity. *See* Allen, *Thoughts on the Jeopardy of Rules of Long Standing to Procedural Challenge*, 33 Ad. L. Rev. 203 (1981).

[81] Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967); *see also* Dunlop v. Bachowski, 421 U.S. 560, 569-70 (1975); Barlow v. Collins, 397 U.S. 159, 165 (1970).

[82] An argument in favor of equating these seemingly neutral formulations with denial of enforcement review is that the APA (in § 703) actually contemplates that *Yakus*-type enforcement limitations might exist where adequate opportunities for preenforcement review are present. *See supra* note 32. Arguably any judicial review provision that permits preenforcement review is an "adequate" alternative in the *Yakus* sense. It is doubtful, however, that a court would expand the implied preclusion doctrine to the enforcement stage on this evidence. In cases where implied preclusion has been found, the statutes involved gave some indication (such as a 60-day provision) that review was to be limited. *See* Morris v. Gressette, 432 U.S. 491, 501-02 (1977).

[83] *See generally* Note, *Statutory Preclusion of Judicial Review Under the Administrative Procedure Act*, 1976 Duke L.J. 431. Of course, failure to use express preclusion language need not be fatal in all situations. The Court has recently acknowledged that "legislative silence is not always the result of a lack of prescience." Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980).

Noise Control Act, Congress has clearly said that after the sixty or ninety day statute of limitations for review of rules has passed there will be no "judicial review" in civil or criminal enforcement proceedings. The critical question under these statutes is whether the presence of the limited preenforcement review provision is adequate to justify denial of all review of the rule at the enforcement stage, even that form of review couched in constitutional terms. Put another way, is preclusion of "judicial review" at the enforcement stage meant to include constitutional review as well?

Two points must be emphasized at the outset. In these *Yakus*-type situations the focus is on limitations upon review of rules, not orders that are the product of adjudication. Judicial review of adjudication raises more substantial due process issues.[84] Second, the focus is on situations in which there is a clear need for quick establishment of uniform standards to implement an important national interest.[85] This aspect of the inquiry becomes more central later when the conditions under which Congress should seek to preclude enforcement review are discussed.

Given the congressional design of the preclusionary enforcement review statutes, what should be the courts' response to objections to a rule's validity raised in enforcement proceedings? If the statute had precluded review of the rule entirely, it has been shown that some residual constitutional review for irrationality or erroneous application would remain.[86] Should even this residuum be foreclosed when time limited preenforcement review was presented? This is the proposition that *Yakus* has come to represent. For a variety of reasons, however, insisting on that broad a reading of *Yakus* may be unnecessary in the present context.

---

[84] *See, e.g.*, Thompson v. Louisville, 362 U.S. 199 (1960) (invalidating under the due process clause conviction obtained without evidentiary support). Valid objections to the lack of judicial review may occur in enforcement proceedings that are themselves adjudications. No limit is meant to be placed upon procedures necessary to establish facts in those proceedings, just the kind of issues that can be raised there, *i.e.*, judicial review of the underlying rules on which the enforcement proceeding is based. It is only the process of bifurcated judicial review that is being limited. *See* J. Choper, *supra* note 32, at 392.

[85] *See* Peabody Coal Co. v. Train, 518 F.2d 940 (6th Cir. 1975); Granite City Steel Co. v. EPA, 501 F.2d 925 (7th Cir. 1974); Kennecott Copper Corp. v. EPA, 462 F.2d 846, 849 (D.C. Cir. 1972); Getty Oil Co. v. Ruckelshaus, 467 F.2d 349, 355-60 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). *See also* ACUS Rec. 76-4, *supra* note 10 (William Frick of EPA, dissenting, 41 Fed. Reg. 56,767, 56,768-69 (1976)) [hereinafter cited as Dissent to ACUS Rec. 76-4]. Professor Currie has questioned whether the national emergency present in the need to achieve clean air or water is comparable to that in *Yakus* involving wartime price regulation. *See* Currie, *supra* note 10, at 1258-60. Although the degree of emergency may be debated, there is little doubt that important national interests requiring fast solutions are at stake in both situations. Indeed Congress almost certainly would not invoke the exceptional limitation of review provisions when there is no perception of national emergency. Congress has not generally been opposed to judicial review of administrative action and indeed has recently been eager to increase its intensity. Consider S. 1080, 97th Cong., 1st Sess. § 5 (1981) (Bumpers Amendment). *See also* *infra* note 155.

One could take the position that Congress, by foreclosing "judicial review" in the provisions under study, meant not to foreclose review of "constitutional" issues. The argument would simply be that, because important interests are at stake, if Congress intends to cut off constitutional review it should say so in those words. It has after all done this occasionally, in statutes like the Trans-Alaska Pipeline Authorization Act.[87] It must then be asked what would be the consequences of this approach to Congress' overall plan of review. For one thing, the kinds of issues that most trouble the Environmental Protection Agency would remain foreclosed. These would be issues going to the procedures employed in the rulemaking and the factual support for the rule.[88] The argument against preserving these rulemaking process issues is that, if left open, they would require the EPA to retain "immense records indefinitely,"[89] to avoid running the risk that the rule will be judged without adequate support at some unspecified time in the future. In addition, any purely legal issues that do not reach constitutional levels would also be foreclosed,[90] including under this analysis the question whether a particular rule was *ultra vires*.[91]

---

[86] *See supra* notes 58-68 and accompanying text.

[87] *See* the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1652(d) (1976), *reprinted supra* at text accompanying note 36.

[88] The respondent who is denied judicial review in enforcement proceedings on these issues will undoubtedly object on a variety of grounds. The objection most frequently to be anticipated is that the respondent was a small entity who did not appear because of financial constraints or, to take the strongest situation, was not even in existence at the time the rule was promulgated. *See* Currie, *supra* note 10, at 1258. The principal reason a reviewing court should not be persuaded by these individualized complaints of lack of notice or ability to appear is simply that rulemaking is not an individualized process. It is legislative in conception and one has no more right to preserve issues going to the rulemaking process than one has to appear (and preserve) issues of similar content before the legislature. The APA notice and comment procedures go beyond constitutional due process requirements. The theory of a legislative or rulemaking process is that even if a particular individual was unable to attend and raise objections, others similarly situated will have objected on behalf of those unable to attend as surrogates in interest. Procedural rights in the rulemaking process are not individual, they are general and can be asserted by any persons who appear in the interests of themselves and of those who do not appear.

[89] *See* Dissent to ACUS Rec. 76-4, *supra* note 85. Presumably these records are

What review would remain and how disruptive would it be? The important difference between legislative rationality review of a rule and arbitrary and capricious review as currently defined is that the former would not require factual support in the rulemaking file. This means that support for the rule can be hypothesized from the statute and the agency's choice of subject matter. This kind of support should not require the indefinite maintenance of "immense records," but only the presence of good lawyers able to articulate a defense of the agency's legislative decision in the reviewing court.[92] Moreover, it is likely that the rational basis for the rule will have been addressed in a preenforcement review proceeding, if one was brought within the statute of limitations period.[93] Although a district court in an

---

needed to defeat challenges based on lack of factual support or failure to permit adequate notice and comment procedures on crucial issues during the rulemaking.

[90] Even before *Crowell* was repudiated, not all legal questions were jurisdictional. Now it can be opined that many legal questions might fall within the usual arbitrary and capricious standard and not be subject to independent constitutional review. *See* Justice Rehnquist's opinion in *Adamo Wrecking, reprinted supra* at text accompanying note 71.

[91] *See supra* text accompanying notes 71-75.

[92] In this situation, the "post hoc" rationalizations of counsel, condemned as inadequate to establish reasons for agency decisionmaking in ordinary judicial review, become entirely appropriate. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962). One would expect court approval in the vast majority of these rulemaking defenses, but the actual percentage of affirmances is hard to predict, because there has been little experience with this approach. The most that can be said is that the rationality standard would probably be less deferential in the rule than in the legislation context, but more deferential than is the present substantive review of rules standard under either the substantial evidence or the arbitrary and capricious formulation. One should keep in mind that the Supreme Court has recently approved a "demonstrably irrational" test for review of an agency's legal determinations. *See* Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980) (reversing the court of appeals for setting aside a Federal Reserve Board interpretation of Truth in Lending Law regulations); *accord* Horizon Mut. Sav. Bank v. FSLIC, 674 F.2d 1312 (9th Cir. 1982); *see also* K. Davis, Administrative Law Treatise 555 (Supp. 1982) (questioning "whether the Supreme Court is systematically increasing the degree of deference reviewing courts must give to administrative interpretations of statutes and regulations").

[93] In environmental rulemaking there is little danger that a rule will slip by without thorough preenforcement judicial review. Appellants are lined up at the conclusion of the rulemaking proceeding anxious to find a receptive circuit court. It is a situation

enforcement review proceeding would not have to honor a different circuit court's decision upholding the rule's validity (assuming no affirmance by the Supreme Court), such a decision would be influential and often persuasive authority. Thus, it may be that rationality (and along with it *ultra vires* and other legal questions) will have been resolved for all practical purposes before the enforcement proceeding is commenced.

This would not be true for the other form of constitutional review, validity of the rule as applied to the particular respondent in the enforcement proceeding. As the earlier discussion of *Adamo Wrecking* indicates,[94] the presence of "as applied" objections to rules opens a large area in which to maneuver for respondents in enforcement proceedings. But this is as it should be; the potential for reaching beyond a rule's intended scope to respondents who did not realize they were covered by the rule should not be overlooked.[95] Other than a denial by the respondent of any violation of the rule, this issue in effect is the one most crucial to a respondent in an enforcement action. Moreover, as adjudicatory proceedings, enforcement actions contain the due process assurance that one can be charged only with the violation of a previously articulated legal standard.

Another way to evaluate the bifurcation of issues proposed here is to ask what costs are imposed by permitting constitutional review in enforcement proceedings and what benefits are gained. One cost is the risk that constitutional review will become the camel's nose under the tent, expanding such review in assertive courts to equate with substantive and procedural review.[96] As Professor Rabin has pointed out in connection with

---

where one can be assured, in Assistant Attorney General William Baxter's phrase, that the matter will be "litigated to the eyeballs." Moreover, it is highly unlikely that any small entity with a particularly appealing story to relate will lack for corporate lawyer sponsors. In this connection one is reminded of that small butcher shop, owned by Mr. Schechter, which, with the background assistance of Bethlehem Steel's counsel, brought down the NIRA. *See* 2 R. Swaine, The Cravath Firm and its Predecessors 1819-1948 at 557-58 (1948).

[94] *See supra* text accompanying notes 67-68.

[95] A variation on this problem is presented when the rule is promulgated in substantially different fashion than it was proposed, thereby causing serious notice problems for those against whom it will be enforced. *See generally* Note, *The Need for an Additional Notice and Comment Period When Final Rules Differ Substantially From Interim Rules*, 1981 Duke L.J. 377 [hereinafter cited as Duke Note].

[96] *See* Justice Rehnquist's expression of concern in *Adamo Wrecking*, discussed *supra* at note 68.

Veterans Administration nonreviewability,[97] once the court permits constitutional inquiries most questions of review can be phrased in constitutional terms.[98] This prospect cannot be ignored, and to some degree Professor Rabin's prediction has been vindicated.[99] However, there are several reasons why it might not be as troublesome when transferred from the VA situation to the present context. First, the VA statute involves total preclusion, not time limited preenforcement review.[100] Second, it frequently involves adjudication, which triggers due process interests not so far present in rulemaking.[101] Third, just because a constitutional claim is postulated does not mean a court must honor it.[102] Hence, although there is some potential for "constitutionalizing" review of rules, and thereby inviting expanded judicial review, there are enough factors cutting in the other direction to make this a relatively unlikely prospect.

Moreover, there are some real benefits to resolving substantive and procedural judicial review at the preenforcement stage. This stage is where the action on review really lies, and if it can be successfully carved out of the enforcement proceeding there is much less to debate at that later stage.[103] Ultimately the clearest benefit is that this bifurcation creates a constitutional method for allocating the reviewing responsibilities in the limitation of review context that should help the courts generally to respect the affected agency's decisionmaking process.

---

[97] *See* Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 Stan. L. Rev. 905, 908-11 (1975) (suggesting first amendment and due process challenges in addition to the equal protection challenge permitted in Johnson v. Robison, 416 U.S. 361 (1974)).

[98] The most prolific source of constitutional rights is of course the due process clause. *See generally* K. Davis, *supra* note 62, § 13.0.

[99] *See supra* text accompanying notes 74-76.

[100] *See* 38 U.S.C. § 211(a) (1976).

[101] *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915); L. Tribe, *supra* note 48, § 10-8, at 513-14.

[102] The practice of phrasing claims for review in constitutional terms is not a new one and the courts have adequate techniques for summarily dispensing with the unjustified ones. Consider in this context the teacher dismissal and tenure denial cases which invariably seem to contain a claim of first amendment deprivation. *See* Board of Regents v. Roth, 408 U.S. 564 (1972); *see also* L. Tribe, *supra* note 48, § 10-8, at 510.

[103] A respondent in an enforcement proceeding cannot make the same argument about the need to raise rulemaking process issues as he can jurisdictional or constitutional ones. The latter are personal to his situation; the former are raised as well by surrogates which appeared in the rulemaking proceeding (and perhaps appealed from it) even if the respondent did not. *See supra* note 88.

Statutes That Impliedly Deny Enforcement Review

Statutes that establish time limits for preenforcement review of rules but do not explicitly forbid review in enforcement proceedings raise similar issues to those that do. The principal difference, of course, is that Congress' intent to preclude enforcement review must be implied from the existence of the time limited review provision. Although it is certainly possible for relevant legislative history to overcome an implication against enforcement review, it should be obvious that in these kinds of cases the broad presumption of judicial review of *Abbott* is not adequate to do so by itself.[104] This inadequacy is especially true since the APA specifically recognizes in section 703 that enforcement review can be deemed precluded if an adequate opportunity for preenforcement review is presented.

The Occupational Safety and Health Act of 1970 offers a good framework for analyzing the problem more generally. When Congress enacted the OSHA it sought to ensure a safe and healthful workplace on a national basis by authorizing the Secretary of Labor to promulgate regulations setting national standards both on an expedited and on a notice and comment basis.[105] In order to expedite promulgation of and compliance with national standards, Congress provided that preenforcement review of rules should be sought within sixty days of the rule's promulgation.[106] At least one circuit court interpreted this provision as barring only later *procedural* challenges to the rule in enforcement proceedings,[107] but several other circuits have re-

---

[104] The *Abbott* Court stated: "[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." 387 U.S. 136, 140 (1967). In City of Rochester v. Bond, 603 F.2d 927, 931 (D.C. Cir. 1979), however, the court found that the presence of a 60-day court of appeals preenforcement review provision overcame the general presumption of review expressed in *Abbott*. The *Bond* court stated (after nodding at *Abbott*): "If, however, there exists a special statutory review procedure, it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review." *Id.*

[105] 29 U.S.C. §§ 651(b), 655(a) & (b) (1976).

[106] *Id.* § 655(f) (1976).

[107] National Indus. Constructors, Inc. v. OSHRC, 583 F.2d 1048, 1052-53 (8th Cir. 1978). The court's rationale for barring later procedural challenges was as follows:

> While the unreasonableness of a regulation may only become apparent after a period during which an employer has made a good faith effort to comply, procedural irregularities need not await the test of time and can be raised immediately. The agency's interest in finality, coupled with the burden of continuous

jected even this limited issue foreclosure in enforcement proceedings.[108] There is legislative history pointing away from a restriction on the scope of enforcement review,[109] and this has been read together with *Abbott* to reassert a presumption of judicial review at the enforcement stage.

The procedural-substantive distinction sought to be established in the OSHA implied limitation situation has some value, especially since the courts that did find jurisdiction to review rulemaking procedure in enforcement proceedings have been largely unpersuaded that any deficiences occurred.[110] This distinction represents a compromise with this article's proposal of preclusion of both substantive and procedural questions in enforcement review proceedings. So long as adequate preenforcement review is available, the only issue need be whether Congress intended to bar review, not whether that is a good idea.[111]

This compromise approach has been found helpful in other implied limitation contexts, notably under the Hobbs Act,[112] which provides a sixty day limit on direct review of final orders, including rules. In *Natural Resources Defense Council v. Nu-*

> procedural challenges raised whenever an agency attempts to enforce a regulation, dictates against providing a perpetual forum in which the Secretary's procedural irregularities may be raised. Were there no limitation upon the time within which procedural attacks could be made, the resulting uncertainty might inhibit employers, otherwise able and willing, from complying with a regulation.

Id. at 1052.

[108] *See* Daniel Int'l Corp. v. OSHRC, 656 F.2d 925 (4th Cir. 1981); Deering Milliken, Inc. v. OSHRC, 630 F.2d 1094, 1099 (5th Cir. 1980); Marshall v. Union Oil Co., 616 F.2d 1113, 1116-18 (9th Cir. 1980).

[109] *See* S. Rep. No. 1282, 91st Cong., 2d Sess. 8 (1970): "While [§ 6(f)] would be the exclusive method for obtaining pre-enforcement judicial review of a standard, the provision does not foreclose an employer from challenging the validity of a standard during an enforcement proceeding." A full study of the legislative history to § 6(a) is outside the scope of this article.

[110] In both *Daniel Int'l* and *Deering Milliken*, the courts ultimately held the procedural challenges to be unsuccessful.

[111] One could argue that if Congress wanted to bar judicial review in enforcement proceedings it should have said so explicitly, as it did in the statutes discussed in the prior section. This is a stern inference to draw. Congress is often not as explicit as it means to be, even though it was explicit when it came to the 60 day preenforcement review provision (which has little meaning if it does not bar enforcement review). Moreover, so long as constitutional review is preserved, it is not as crucial for a court to imply that Congress intended not to grant enforcement review.

[112] 28 U.S.C. § 2344 (1976).

clear Regulatory Commission,[113] the court read that act to bar a delayed procedural challenge to a rule promulgated initially by the NRC without notice and comment procedures.[114] The court stated:

> The 60 day period for seeking judicial review set forth in the Hobbs Act is jurisdictional in nature, and may not be enlarged or altered by the courts. This time limit, like other similar limitations, serves the important purpose of imparting finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of regulatees who conform their conduct to the regulations.[115]

The court went on to recognize that its ruling was, as in the OSHA challenges, limited only to procedural matters relating to the rulemaking process brought by those who could have made such challenges within the prescribed time limits.[116] Since the Hobbs Act is also an implied limitation situation, it presents another example of how Congress, with the courts' assistance, can use review provisions to channel the questions that may be raised on judicial review of rules.

A Synthesis: Distinguishing Between Rule Process and Rule Legality Challenges

While the procedural-substantive solution does not go as far as has been suggested here for the explicit limitation cases (which would also preclude enforcement review of the substance of the rule), it does begin to focus on the advantages of limiting review of the rulemaking process. The crux of the matter is distinguishing between those procedural (and substantive) complaints that relate to the rulemaking process and those that relate to the ultimate legality of the rule itself.[117] In the former situation there are two factors that favor limiting review to the preenforcement stage: (1) the rule process challenges should be heard before the events surrounding promulgation become stale and difficult to reconstruct; and (2) the rule process challenges should be heard early so that there is no doubt as to the rule's procedural regularity by those who must enforce or comply with the rule.

---

[113] 666 F.2d 595 (D.C. Cir. 1981).

[114] *Id.* at 602. The posture of the case was that NRDC raised procedural objections to the initial rule in a petition for reconsideration some 17 months after the initial rule was promulgated. NRDC had not appealed from the initial rule within 60 days but argued that the denial of the petition for reconsideration was arbitrary and capricious because NRC refused to acknowledge its initial rule had been promulgated without proper notice and comment procedures. *Id.* at 601.

[115] *Id.* at 602 (footnotes omitted). In making its jurisdictional ruling, the court relied upon its earlier decision in Geller v. FCC, 610 F.2d 973 (D.C. Cir. 1979), denying a challenge to a rule some five years later because of a 60-day direct review provision.

[116] 666 F.2d at 602-03. It should be noted that the later challenge was not made in an enforcement proceeding.

In effect the separation of rule process challenges from rule legality challenges is simply a way for Congress to decide issues efficiently. Since process questions will never be more ripe than just after the rule is promulgated, they should be decided then. Moreover, if there is any deficiency in the procedural or substantive support for a rule, it should be revealed immediately so that the agency involved can revise the regulation promptly. This approach might sometimes mean that rules will go unchallenged on procedural or substantive grounds because no appeal is taken within sixty days. Although this is certainly a possibility, one should remember that it comes about only in situations in which Congress has made an explicit or implicit decision so to limit judicial review; and it only forecloses nonconstitutional challenges to the rule's validity.[118]

To some extent this analysis applies to constitutional challenges of a rule's legality as well. But one would be more reluctant to imply a time cutoff on constitutional challenges when the particular respondent has not had an opportunity to argue the points raised. Of course, if they have in fact been raised by others then there may be little to relitigate. But it is doubtful that constitutional challenges to the application of a rule to a particular respondent's conduct will have been previously determined.

---

[117] It must be conceded that the distinction sought to be drawn here is to some degree a play on words. Both challenges to the procedures employed in rulemaking and to its factual support deal with a rule's "legality" in a technical sense as much as do later legal challenges that raise constitutional level issues. However, the distinction looks at the issues surrounding a rule in two different stages: one, when it is being formulated, the other after it becomes law. In the former stage the challenges are unique to the process of rulemaking; in the latter stage the challenges are the same as those to statutes enacted directly by Congress. This approach is really another way to express the earlier drawn distinction between judicial review and constitutional review.

[118] The possibility of some form of "good cause" exception to rule process issue foreclosure is explored in the next section.

In the implied as well as express limitation of enforcement review situations then, Congress makes a choice to limit review by separating it in this fashion both in time and in subject matter. The weight of the argument here is that there is every reason for the courts to honor that choice so long as basic constitutional questions are preserved.

ADMINISTRATIVE RECONSIDERATION AS AN "ADEQUATE" ALTERNATIVE TO JUDICIAL REVIEW

If one accepts the distinction between constitutional and judicial review of rules and permits the latter inquiry to take place exclusively at the preenforcement stage (even in some situations where statutes do not specifically forbid judicial review in enforcement proceedings), then this article has gone far enough. However, there are undoubtedly those judges, legislators, and commentators who are skeptical about such a clean division of reviewing functions and who would be reassured by the presence of other alternatives that might ameliorate any unforeseen inequities.

Agency reconsideration of its own rules is a traditional method for doublechecking on the substantive (and procedural) support for its initial rules. It may be included as one of the "adequate" alternatives to enforcement review in the *Yakus* sense, especially when reconsideration itself is subject to judicial oversight.[119]

Moreover, there is the nagging feeling that some case will present a situation where substantive and procedural review of a rule would make sense even though it occurs long after the preenforcement stage. The textbook case is *United States v. Nova Scotia Food Products Corp.*,[120] in which the court permitted a respondent in an enforcement proceeding to challenge the procedures employed in a rulemaking proceeding conducted some five years earlier. In declaring the regulation invalid, the court focused on the fact that the Food and Drug Administration had refused to make available at the rulemaking proceeding the scientific data on which its rule relied.[121] Under the approach advocated here, the court's solution would be disfavored.[122] However, one is sympathetic to the respondent's plight, and it is worth asking whether the solution to *Nova Scotia* might not have rested with the agency itself through some form of reconsideration.[123]

---

[119] In *Yakus* the adequate alternative was the presence of the time limited preenforcement review provision. It is not suggested here that agency reconsideration in lieu of time limited preenforcement review would be an adequate alternative to enforcement review, but it is possible that its presence might moderate some objections to statutes that preclude enforcement review of rules entirely and of course it is another means of mitigating any unforeseen difficulties caused by applying limitation of review to the preenforcement stage.

[120] 568 F.2d 240 (2d Cir. 1977).

There are several kinds of agency reconsideration provided in the APA and organic legislation[124] that break down into two approaches: individual determinations in the form of waivers or exemptions from the operation of an otherwise valid rule and generic determinations that seek the amendment or repeal of a rule. Both situations offer special problems as well as opportunities. In addition both situations pose challenges to the reviewing court in terms of timing and scope of review. Each of these problems will be analyzed separately and then related to the theme of adequacy of alternatives to judicial review of enforcement proceedings.

Requests for Waivers and Exemptions from Rules

Since rules are by hypothesis abstract solutions to general problems, inevitably there will be occasions when the conduct proscribed and the individual affected thereby do not fit. If the fit is totally lacking, there may be constitutional limits upon the application of the rule that could come into play at any time.[125] In the past the courts have encouraged agencies to engage in rulemaking in order to establish standards of conduct and illuminate often vague statutory mandates.[126] But at the same time the courts have looked upon the availability of a waiver or exemption process as a desirable if not necessary "safety valve" for those caught in the rulemaking process.[127] As a result, most agencies provide for petitions for waiver from the effect of rules, which may be granted upon a proper showing of hardship or lack of fit with the rules.

---

[121] *Id.* at 251-52. The problem of insufficiency or absence of notice and comment procedures is likely to arise in the OSHA rulemaking situation with some regularity because Congress provided that industry standards could be adopted by the Secretary without notice and comment rulemaking. *See* 29 U.S.C. §§ 651(b), 655(a) & (b) (1976).

[122] This case did not involve a statute explicitly foreclosing enforcement judicial review, which would be the strongest situation for denial of enforcement review.

[123] Of course it is not so easy to recast this as a waiver or amendment situation if the agency has proceeded to enforce the rule against the respondent. Arguably the respondent did not know it would be subject to the rule, or did not want to attract attention by questioning it before the enforcement action was commenced. At that stage, there would have to be a judicially required referral to the agency for reconsideration while the enforcement proceeding was stayed. In this way the court could avoid declaring a rule invalid for procedural defects while the agency is given the opportunity to reconsider its rule. *See* Batterton v. Marshall, 648 F.2d 694, 711 (D.C. Cir. 1980) (holding a Department of Labor BLS statistical rule subject to notice and comment procedures in the future, but not declaring invalid the currently operative BLS rule).

[124] *See* 5 U.S.C. § 553(e): "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule"; Magnuson-Moss Warranty-F.T.C. Improvement Act, 15 U.S.C. §§ 57a(g)(1) & (2) (1976) (petitions for exemptions from rule must be promulgated with APA § 553 procedures).

As a practical matter, however, waivers are seldom granted by an agency, and they are often denied without anything approaching an administrative hearing.[128] Moreover, there are some who rightly suggest[129] that the extensive use of waivers may have the adverse consequence of favoring some competitors over others in situations in which the waivers are granted on an *ad hoc* and often unpublicized basis.[130] Although there are ways to ensure against this disadvantage to the use of waivers,[131] waivers are not sufficiently available to act as a functional alternative to enforcement review.[132] The most that can be said is that waivers or exemptions may on occasion provide a preferable alternative—both for the petitioner and the agency—to judicial review in enforcement proceedings.

---

[125] *See supra* text accompanying note 64.

[126] *See* SEC v. Chenery Corp., 332 U.S. 194, 202, 209 (1947); H. Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards 141 (1962).

[127] *See* United States v. Storer Broadcasting Co., 351 U.S. 192, 202-05 (1956). *But see* FCC v. WNCN Listeners Guild, 450 U.S. 582, 601 n.44 (1981) (holding that the FCC may adopt rules without the "safety valve" of a waiver provision).

[128] For example, despite thousands of individual waiver requests, the FAA has never approved a waiver of its age 60 retirement rule for pilots. *See, e.g.*, Rombaugh v. FAA, 594 F.2d 893, 897 (2d Cir. 1979); Starr v. FAA, 589 F.2d 307, 309 (7th Cir. 1978).

[129] *See* Davis, *Judicial Review*, *supra* note 6, at 292.

[130] The FTC Magnuson-Moss waiver provision is exceptional in actually specifying procedures (albeit informal rulemaking procedures) for the determination of waiver petitions. *See* 15 U.S.C. §§ 57a(g)(1) & (2) (1976).

[131] Of course the problem of competitive advantage secured by private or preferential access to agency officials is not limited to formal waiver requests. *See* Wade, *Government by Nudge and Wink*, N.Y. Times, June 14, 1982, at A-18, col. 1 (documenting a meeting between a New Mexico refiner and Anne Burford, née Gorsuch, former EPA Administrator, over applications of the lead regulation on gasoline where she allegedly promised that, rather than grant a formal waiver, she would simply restrain the EPA from enforcing its lead regulations against the refiner). The problem of private lawmaking can be overcome by Federal Register notice of the waiver proceeding, which should in most cases reach the competitors of the individual seeking an exemption from the rule. There is no reason why waivers must be treated by the agency as the administrative equivalent of a private bill in Congress.

Petitions for Amendment or Repeal of Rules

A hesitation similar to that expressed with regard to waivers surrounds the use of petitions to amend or repeal rules that might be the subject of judicial review in enforcement proceedings. Petitions to amend are desirable because they give an agency an opportunity to reconsider its own rule before subjecting it to judicial review in enforcement proceedings. If, as in the *Nova Scotia* case, there are real problems with the factual support for the rule, the reconsideration process invites the agency to place its rule on a more solid substantive footing before it is scrutinized in court and possibly declared invalid. This invitation is just that, however, and there are sound policy reasons why the courts would not want to make it a command to the agencies.

Given the need to set its policymaking docket in advance and the limited nature of its decision resources, an agency is often not in a position to turn to a rule reconsideration request simply because one of those regulated is so disposed. To impose this technique upon agencies is simply to set their rulemaking priorities for them. Of course, there is a special situation in which the court remands a rule for reconsideration during an enforcement review proceeding,[133] but even here the agency may prefer not to amend its rule and risk its being declared invalid.

On the other hand, amendment and repeal petitions have advantages over the waiver and exemption process to the degree that the former are generic and public. While the waiver or exemption process is or can be an individualized and even private one,[134] the amendment or repeal process is like the rulemaking process itself. Thus it ensures public participation and a full airing of the issues. For these reasons it is seen by some commentators as preferable to direct judicial review for those frustrated by a rule's initial formulation.[135] It is also an approach that has been utilized by the courts when review of a rule is sought after the time limit on preenforcement review has passed.[136] Thus whether petitions to amend or repeal are satisfactory alternatives to enforcement review in all situations, they are obviously an increasingly useful technique for securing "review" of an agency's rule. However, before one would go so far as to endorse the practice unequivocally, the implications for judicial review should be considered.

---

[132] Presumably, the denial of judicial review (as opposed to constitutional review) should be on the ground that an adequate preenforcement review opportunity was presented. Moreover, when a respondent in an enforcement proceeding is charged with violating a rule, it is unlikely that the agency would be of a mind to grant him a waiver from the application of that rule. If the case against him were so questionable in the first place, then perhaps it raises constitutional review issues.

[133] In this situation the agency is given a stern choice: either permit an amendment or repeal proceeding to go forward or have the underlying rule declared invalid. *Cf.* Batterton v. Marshall, 648 F.2d 694 (D.C. Cir. 1980) (finding agency rulemaking process insufficient due to lack of notice and comment opportunities and declaring that such opportunities must be given in future rulemaking, but holding present rule valid).

The Scope of Judicial Review over Denials of Petitions for Reconsideration

If one assumes that an agency grants one of the various petitions for reconsideration discussed above, then there is likely to be a full administrative record that can be subjected to judicial review in the usual way by those dissatisfied with the outcome.[137] This is the best of all possible worlds for those who would advocate use of reconsideration techniques in lieu of enforcement review of existing rules. But it should be apparent that many more petitions to amend and requests for waiver will be denied than granted. The agency, after all, has usually promulgated its rule after extensive notice and comment in the first place, and it is unlikely to be impressed by reconsideration requests from those who were or could have been present during that process.[138] Thus denials will be the rule and grants the exception. In this situation one must consider the scope of judicial review that the courts should impose on such denials and the kind of record they should expect denying agencies to produce.

---

[134] *See supra* notes 130-31 and accompanying text.

[135] *See* Auerbach, *Informal Rule Making: A Proposed Relationship Between Administrative Procedures and Judicial Review*, 72 Nw. U.L. Rev. 15, 61-68 (1977); Davis, *Judicial Review*, *supra* note 6, at 292-94.

[136] *See* Laminated Safety Glass Ass'n v. CPSC, 578 F.2d 406 (D.C. Cir. 1978); Investment Co. Inst. v. Board of Governors, 551 F.2d 1270, 1280-81 (D.C. Cir. 1977).

[137] Presumably those who achieved the desired outcomes—whether by waivers or exemptions, or amendments or repeals—would not have much incentive to appeal. However, others who participated in the process could well object. Indeed, some of them may be the competitors who appeared in waiver proceedings or others who were satisfied with the rule as originally formulated.

Viewed in the abstract, denials of any type of informal agency action are bounded by only minimal procedures. No hearing need be had concerning the request, and the only "procedure" that need be provided (under the APA at least) is a "brief statement of the grounds for denial."[139] This statement of denial is usually subject to very narrow judicial review under cases like *Dunlop v. Bachowski*,[140] which look only to the four corners of the agency's denial statement to determine the grounds and the essential facts on which it is based.[141] In *Investment Co. v. Board of Governors*,[142] Judge McGowan determined that the arbitrary and capricious scope of review standard would be applied to any agency denying reconsideration.[143] This standard is malleable enough to deal with the limited issues likely to be presented on reconsideration review.[144]

One difficulty, however, is in determining the kinds of reasons an agency should be permitted to use in denying a reconsideration petition. If a petition is directed at an amendment or repeal[145] of a recently promulgated rule the agency may well feel that any extended review of the petition is unnecessary or unduly burdensome from an allocation of resources point of view. It may be a sufficient answer, therefore, for the agency simply to say in summary form that it has just completed its rulemaking on that subject and has seen no need to reopen the matter at the present time. There is no reason why such a response should not survive an arbitrary and capricious test. On the other hand, that kind of response in the *Nova Scotia* situation would likely have exhausted the credulity of the reviewing court.

---

[138] The *Nova Scotia* situation remains an exceptional one in that the rule was promulgated five years earlier (a long time by most standards) and the key scientific data were not produced for comment. For these reasons the *Nova Scotia* case remains a good candidate for reconsideration rather than enforcement judicial review.

[139] 5 U.S.C. § 555(e) (1976).

[140] 421 U.S. 560 (1975). *See also* WWHT, Inc. v. FCC, 656 F.2d 807 (D.C. Cir. 1981) ("very narrow" scope of review over agency decision to institute rulemaking).

[141] 421 U.S. at 573-74.

[142] 551 F.2d 1270 (D.C. Cir. 1977). *See also* NRDC v. SEC, 606 F.2d 1031 (D.C. Cir. 1979).

[143] 551 F.2d at 1281.

[144] The court defined the record as follows: "The administrative record for review would include the information and affidavits submitted to the agency by the aggrieved party, the record of any hearings on the matter, and the Board's response (which might incorporate by reference the record of the original rulemaking proceedings)." *Id. Accord* NRDC v. SEC, 606 F.2d 1031, 1053 (D.C. Cir. 1979).

[145] If the petition involves a waiver or exemption there may be less reason to believe that the request would require a major rethinking of the agency's rule.

The approach of the reviewing court on denial of reconsiderations will determine how effective such a technique is for avoiding the limitations on scope of review in enforcement proceedings. If what is sought on reconsideration is a substantial rethinking of the underlying rule, it is doubtful that such will occur in the vast majority of cases. For this reason an enforcement court ought not to treat reconsideration as an exhaustion of administrative remedies device.[146] But it is still possible that an agency on occasion can offer its views in a helpful way on reconsideration or, if it does not, that a court on review of *that* decision can offer the petitioner judicial relief that was desired in the enforcement proceeding.

Reconsideration is not under all these circumstances an entirely adequate response to the exceptional case like *Nova Scotia* where the temptation is to permit late challenges to the process of rulemaking in order to protect a respondent from the application of a scientifically unsupported rule in an enforcement proceeding. It may be that on rare occasions a declaration of a rule's substantive invalidity by a reviewing court would make sense even years after its promulgation.[147] But this longshot possibility is not an adequate basis for upsetting the congressional plan for limiting judicial review of a rule to the preenforcement stage. The most that can be asked of any preclusion statute is that it be satisfactory in the vast run of cases; if it fails in the rare situation then reconsideration techniques should be available to help avoid any real difficulties. If a case slips through even that safety net, then the court's inherent powers will undoubtedly be called into play.[148]

---

[146] The exhaustion requirement would suggest that the reconsideration petition be a precondition to any decision to enforce the agency's rule. Thus this could force a stay in the enforcement proceeding and lead to unnecessary delays. Exhaustion in this situation should not be a mandatory requirement, but "a matter of sound judicial discretion." Cerro Metal Prods. v. Marshall, 620 F.2d 964, 970 (3d Cir. 1980).

[147] Another situation in which late review might occasionally be proper is when the rule promulgated differs substantially from the rule proposed. In this situation many who were later to be affected might not have had any awareness of the rule's application to them. *See* Wagner Elec. Corp. v. Volpe, 466 F.2d 1013, 1019-20 (3d Cir. 1972). *See generally* Duke Note, *supra* note 95.

CONCLUSIONS AND RECOMMENDATIONS

The problem of accommodating Congress' interest in channeling and limiting judicial review of rules to the Courts' concern with protecting the judicial process under article III is not insoluble. Therefore, it is surprising that Congress and the courts have probed each other's territory for so long without achieving a clearer understanding. Recent congressional initiatives, spawned by an increasing demand for national environmental, health, and safety standards, heighten the need to clarify the necessary role of the courts in the reviewing process. This need invites a study that focuses upon the content of constitutional review as part of the overall scheme of judicial review.

The assumption is that Congress has historically welcomed the participation of the courts in the review of agency decisions to a degree that exceeds the amount of review that is constitutionally imperative. When Congress cuts back on judicial review it comes closer to the largely uncharted territory of constitutionally minimal review.

When faced with a statute that seeks to limit review of rules narrowly to the preenforcement stage, the courts must strain to avoid making the constitutional review determination.[149] But by avoiding a clear statement on the content of constitutional review the courts send confusing signals that can produce negative consequences. For one thing, Congress itself will often respond by patching only the statutory hole exposed, thereby failing to reexamine the constitutional seaworthiness of the underlying vessel.[150] Also, lower courts with expansive notions of the role of constitutional review of agency behavior will continue to upset decisions that otherwise should be upheld.[151] This action causes an unnecessary loss of time and a waste of decision resources for all three branches of government.[152]

---

[148] Because these should be a statistically insignificant number of cases, there should be no need to formulate a "good cause" exception to the reconsideration alternative. If a court is approached to create such an exception, it should not place great weight on a respondent's particular circumstances such as a failure to appear at the original rulemaking proceeding or a failure to appear at the preenforcement stage. *See supra* note 88.

[149] This is basically what the Supreme Court did in *Adamo Wrecking*. *See supra* notes 65-68 and accompanying text; *see also* NRDC v. EPA, 673 F.2d 400, 406 (D.C. Cir.), *cert. denied*, 103 S. Ct. 175 (1982).

[150] This was the approach Congress tried to take with the Clean Air Act. *See*

A general approach to constitutional review of agency rules can be achieved at low institutional cost. No statutes need be amended and no cases need be overruled. The rationale offered here can be superimposed upon the existing framework of review with little difficulty. The first step is theoretically to separate constitutional review from ordinary judicial review; the second step is to define its content; and the third is to apply it to the current group of preenforcement review statutes.

The case for constitutional review is contained in the jurisprudence of article III: Congress cannot turn over the judicial power to non-article III tribunals, such as agencies, unless the courts have a role to play in supervising that exercise of power. This principle immediately suggests that adjudication by agencies is a more sensitive grant of power constitutionally than is the grant of the legislative-like power to make rules. The constitutional concern in this kind of grant is tied to the courts' role in reviewing legislation and in that way protecting its role under article III. The constitutional standard for overseeing the exercise of rulemaking power is rationality review, which often implicates the equal protection and due process clauses as well as other specific substantive constitutional provisions, such as the first amendment.

Another source of constitutional review power over rules is raised not at the rule review stage but at the enforcement stage, when an otherwise unobjectionable rule is sought to be applied by an agency to a particular respondent. Here the concern is the more traditional one involving the judicial power, since a respondent, in what has now been transformed into an adjudication, must have the ability to challenge the application of a rule or

---

supra discussion of *Adamo Wrecking* at note 9, and Justice Stevens' comment in dissent that the Clean Air Act's "history indicates that Congress is patiently correcting judicial errors." 434 U.S. at 306 n.24 (Stevens, J., dissenting).

[151] *See supra* discussion of the Three Sisters Bridge litigation at notes 40-41.

[152] The executive branch, as well as the Court and Congress, has an interest in clarifying the role of constitutional review since executive agencies like the EPA implement policy emanating from the White House.

statute to his or her situation. This type of challenge will probably be the principal (and perhaps only) question that will be left open in an enforcement proceeding.[153] As a matter of due process, a respondent must have the opportunity to challenge the application of a statute or of a rule.

Beyond this minimal constitutional protection, however, Congress should be able to foreclose or narrowly limit judicial review of rules. A distinction drawn here is between challenges to the process of rulemaking, such as whether it was promulgated with proper statutory procedures and whether it has factual support in the rulemaking record, and those to the rule's overall legality from a constitutional perspective. The process challenges are usually those ensured through the APA or organic legislation, which participants become accustomed to assert unless Congress has explicitly or implicitly foreclosed them. Because Congress acts only occasionally so to foreclose, the presumption of judicial review of rules has taken on an exaggerated importance. When it is challenged by Congress itself in particular statutes, the presumption must give way since ordinary judicial review can only be asserted with legislative concurrence.[154]

The prototype statutes under study here fit comfortably into this structure when they speak in terms of preclusion of "judicial review" in civil or criminal enforcement proceedings. Similarly, if the statute at issue establishes time limits for preenforcement review but does not expressly forbid enforcement judicial review, Congress may have nonetheless implied such a result. Here the inquiry should be directed at the question of congressional intent, and the general presumption of judicial review formulated by the courts should not bias the analysis unduly.[155] Of course, where Congress has not specified any time limits on judicial review it is more difficult to conclude that it intended to reject the courts' presumption of judicial review over rules in enforcement proceedings.

---

[153] *See supra* note 93.

[154] It should be recalled that article III sets both a minimum and maximum standard for the exercise of judicial power. *See supra* text accompanying notes 12-14. If a court refuses to honor a congressional preclusion of review statute, when no constitutional interests are present, it is reaching into the arena of legislative power under article I.

[155] Once again, it is the congressional will that should be respected, not the courts' broad presumption of judicial review, which should be employed only when it is consistent with the congressional view (*i.e.*, where there is no apparent intent to preclude review). In reality the courts in the implied preclusion cases are in something of a conflict of interest situation; they must balance their desire to provide review against the congressional desire to deny it. *See* Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565

This indeterminancy raises the question whether Congress should be encouraged to make its view on limitation or preclusion of review more explicit in future legislation. Certainly if Congress decides to preclude judicial review entirely (as it has done with the Veterans Administration), its cause would be aided if it stated explicitly that only constitutional issues remain open. The courts will then at least be less ready to presume review of nonconstitutional legal issues.[156] But preclusion of judicial review of rules is not likely to be as great a source of congressional interest as limitation of review.

If Congress decides to limit review of rules at the enforcement stage, it should follow certain guidelines. First it should feel free to do so in those special situations where review must be narrowed to provide fast, uniform, and final resolution of national rules.[157] Second, the legislation limiting review at the enforcement stage should explicitly so state, as in the Clean Air Act situation. Third, the explicit statement should include a provision that permits review of constitutional issues in enforcement proceedings, at least in criminal proceedings. Alternatively, if Congress wants to foreclose constitutional issues in noncriminal enforcement proceedings, it should state that position as well.[158] Finally, Congress should decide whether some legal issues of close to constitutional proportions, namely *ultra vires* challenges, should not be treated for purposes of this narrow re-

---

(1980), where, in a related context, the Court confirmed that "judges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme."

[156] *See supra* text accompanying notes 72-76.

[157] Limitations on judicial review of rules or other administrative conduct have always been treated as exceptional situations by Congress (or state legislatures) and by the courts. This treatment does not mean that courts independently scrutinize the justifications for legislative decisions to narrow review, but it does suggest that a massive shift in that direction would require a major rethinking of the courts' long standing general presumption in favor of judicial review. As a practical matter, of course, the legislative branch would be unlikely to countenance a broad contraction of judicial review of administrative action. Indeed, Congress appears to be moving in the opposite direction with judicial review proposals like the Bumpers Amendment. *See* S. 1080, 97th Cong., 1st Sess. § 5 (1981).

[158] *See supra* note 69.

view as if they were of constitutional stature.[159] Drafting precision in future legislation along these lines should make limitation of review of rules at the enforcement stage a more acceptable, and therefore a more useful, technique.

A small number of cases involving unusual circumstances may not fit well into situations denying enforcement judicial review.[160] In these exceptional situations the reviewing courts have traditionally found ways to engage in enforcement review of the process of rule promulgation. This action can be disruptive of the scheme for review suggested here. The courts have been experimenting with alternatives that are less disruptive of the relationship between agency and court. The opportunity for an agency to reconsider its rule (either through waiver or exemption, or amendment or repeal proceedings) can be of substantial utility, so long as the court's expectations of an agency's response to reconsideration requests are not too demanding. If these alternatives are available there will be few, if any, cases in which preclusion of enforcement judicial review is prejudicial to the individual respondent and many cases where its exercise will streamline and expedite the process of making rules final and effective.

The concept of constitutional review is something the courts have been utilizing since the beginning of the Republic, but little effort has been made to apply that concept to the review of agency rules. By so doing, the courts can usefully distinguish between that form of review Congress authorizes at its option and that form the courts impose as part of their judicial function. Once this distinction is drawn, statutes precluding or limiting judicial review of rules can be made to fit more comfortably into the overall constitutional plan.

---

[159] As discussed earlier, *ultra vires* challenges do not fit neatly into the distinction between constitutional and ordinary judicial review drawn here. *See supra* text accompanying notes 72-76. The question whether an agency is acting beyond its delegated authority is such an important one that, even though it is thought of today as a legal, not a constitutional question, Congress may want to give it special treatment in limitation of enforcement review provisions. This would open up subsequent challenges considerably. If *ultra vires* review is not provided, courts may take some comfort from the fact that such challenges would likely have been made at the preenforcement review stage *if* judicial review occurred at that time.

[160] *See supra* notes 120-23 and accompanying text.

STATEMENT OF THE ADMINISTRATIVE CONFERENCE ON PROPOSALS PENDING IN CONGRESS TO AMEND THE INFORMAL RULEMAKING PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT

(Adopted June 18, 1982)

The Administrative Conference has reviewed the major regulatory reform proposals pending in Congress: H.R. 746, the Regulatory Procedure Act of 1982, reported by the House Judiciary Committee on February 25, 1982, and S. 1080, the Regulatory Reform Act, passed by the Senate on March 24, 1982. These bills would substantially revise the provisions of the APA governing informal rulemaking, 5 U.S.C. § 553. Our views on the following proposed revisions of § 553 are set forth below.

1. *Notice of proposed rulemaking.* The Conference believes the detailed notice requirements of amended § 553(b)(1)(F), in section 3 of the Senate bill, are unduly burdensome as general requirements in rulemaking.

The Conference recommends enactment of the provision in section 3 of the Senate bill that would amend § 553 to require publication of a new notice of proposed rulemaking and an opportunity for comment thereon, whenever the provisions of the rule the agency plans to adopt are so different from the provisions of the original proposal that the initial notice no longer fairly apprises the public of the issues ultimately to be resolved in the rulemaking.

2. *Opportunity to present comments.* The Conference has no objection to enactment of the provisions in the House and Senate bills that would establish a minimum comment period in rulemaking under § 553, provided that the "good cause" exception in § 553(b) is retained.

The Conference recommends that an opportunity for oral presentation of data and views should not be a mandatory requirement in rulemaking under § 553 even if the requirement is limited, as in the Senate and House bills, to "major" rulemakings. The Conference has recommended, in Recommendation 76-3, that in appropriate circumstances agencies should utilize oral presentations in informal rulemaking, but agencies should have discretion to decide when and to whom the presentations are made.

3. *Cross-examination.* The Conference recommends that Congress not enact the provisions in the Senate and House bills that would require cross-examination to be permitted in rulemaking under section 553, even though the bills would only require use of cross-examination as a "last resort" procedure. The Conference has previously recommended, in Recommendation 76-3, that agencies should give interested persons an opportunity to indicate issues of specific fact for which they contend cross-examination is appropriate, and that if cross-examination is permitted, it should be strictly limited as to subject and duration.

4. *The requirement of a rulemaking file.* The Conference recommends that Congress amend the APA to provide that, in rulemaking under § 553, an agency shall maintain a public rulemaking file beginning no later than the date on which the notice of proposed rulemaking is published. At a minimum, the agency

should be required to place in the public rulemaking file, promptly upon receipt or production, the following materials: (1) all notices pertaining to the rulemaking, (2) copies, or where impractical a reference to or index of, all factual material upon which the agency substantially relied in formulating the proposed or final rule, unless the material is by law exempt from disclosure, (3) all written comments submitted by interested persons during the rulemaking, and (4) and other material required by statute or agency rule to be made public in connection with the rulemaking.

5. *Opportunity to comment on material in the rulemaking file*. The Senate bill provides that an agency may not substantially rely upon factual material that was not placed in the rulemaking file in time to afford the public an adequate opportunity to comment on the material. The Conference opposes enactment of a statutory provision to this effect because the practical effect of such an inflexible requirement would be to encourage nonsubstantive challenges to final agency rules. The Conference, however, does reaffirm the principle, stated in Recommendation 76-3, that agencies provide an appropriately limited additional opportunity to comment when material placed in the rulemaking file, including comments filed in the proceeding, presents new and important issues or serious conflicts of data.

6. *Statement of basis and purpose*. The Conference recommends enactment of the provisions in the House and Senate bills that would amend § 553 to add a requirement that the statement of basis and purpose accompanying a final agency rule include a response to all significant issues raised in the public comments received by the agency during the comment period established for the rulemaking.

STATEMENT OF THE ADMINISTRATIVE CONFERENCE ON DISCIPLINE OF ATTORNEYS PRACTICING BEFORE FEDERAL AGENCIES

(Adopted December 17, 1982)

Because of the controversy regarding actions by the Securities and Exchange Commission, through administrative rather than court proceedings, to discipline attorneys whose services were used in transactions that the Commission believes violate the securities laws, the Administrative Conference undertook a study of procedures and concerns of federal departments and agencies in disciplining attorneys practicing before them. The Conference concludes that any current problems arising from the discipline of attorneys by federal agencies are not of such magnitude or so widespread as to require legislative action or the adoption of uniform federal standards.

BACKGROUND REPORT FOR STATEMENT ON DISCIPLINING OF ATTORNEYS

Report of the Administrative Conference Committee on Governmental Processes Concerning Discipline of Attorneys Practicing Before Federal Agencies

Issue

Do agency practices for disciplining attorneys who appear before them warrant legislative or other government-wide action?

Background

Largely because of the controversy regarding efforts by the Securities and Exchange Commission to discipline attorneys who practice before the Commission, the Administrative Conference undertook a study of procedures and concerns of federal departments and agencies in disciplining attorneys practicing before them. Our research failed to disclose any evidence of significant problems of attorney misconduct before federal agencies or agency disciplinary actions. Indeed, with the exception of three agencies, the Securities and Exchange Commission, the Department of the Treasury (Internal Revenue Service), and the Interstate Commerce Commission, only occasional instances of attorney misconduct have been reported, and no difficulty in dealing with those isolated occurrences has been suggested. Other than at the SEC and the IRS, all cases of attorney discipline that we discovered involved disruptive or contumacious conduct alleged to undermine the integrity of a proceeding before the agency. These cases either were handled by the agency's taking disciplinary action limited to the particular proceeding or were referred to state bar authorities for more extensive proceedings leading to suspension or disbarment.

The SEC conducts approximately thirty-five law enforcement investigations per year involving alleged misconduct by attorneys. Virtually all of these cases involve accusations of participating in or aiding and abetting a violation of the securities laws, in some instances through the issuance of legal opinions necessary to sell securities. According to the SEC, in almost all of the cases involving attorney misconduct, the agency seeks injunctive relief in federal district court in the same manner as against other violators. There were approximately fifty-seven cases of disciplinary action against attorneys from 1950 to 1979, and only seven were contested. In most cases that are settled, the accused attorney normally agrees voluntarily to suspend or surrender the right to practice before the Commission, sometimes including the right to issue legal opinions necessary for the sale of securities. However, on occasion, the Commission has charged an attorney in an administrative proceeding before the Commission with misconduct for actions involving advice to clients, without bringing a substantive charge of violation of the securities laws against the attorney in federal court. It is the latter practice which has been the chief subject of controversy in the corporate bar.

The disciplinary cases handled by the Treasury Department involve attorneys as well as other tax practitioners (accountants and enrolled agents) who themselves have violated the income tax laws, or have already been disciplined by a state bar. There are about eighteen disciplinary cases each year against attorneys. In about twenty-five percent of these cases the respondent requests an evidentiary hearing, which is conducted before an administrative law judge whose decision is appealable to the Secretary of the Treasury and the federal courts. Both the investigation and prosecution of disciplinary violations are initiated by an office separate from and independent of the tax compliance part of the IRS, and only after a final determination of a substantive tax violation. The Treasury reports no difficulty in dealing with these cases.

The Interstate Commerce Commission has considered approximately a dozen cases of attorney misconduct in the last two years. Almost all involved charges that attorneys had filed false papers with the ICC; one involved an alleged conflict of interests when an attorney was representing adverse claimants. The current agency policy is to refer all such cases to state bar authorities in the first instance, but it reserves the right to review the state's action. Commission enforcement officials have expressed general satisfaction with the results of this procedure.

In August 1982, the House of Delegates of the American Bar Association adopted a resolution urging the Congress to enact legislation to place with the states the responsibility of disciplining attorneys engaging in professonal misconduct before federal agencies. Under the proposal, federal agencies could not adopt standards of practice or exercise disciplinary authority over attorneys unless Congress has expressly granted the agency that power, or unless necessary to maintain order in or assure the integrity of a particular agency proceeding.

Regulation of attorneys in federal agency practice raises the issues of what types of attorney conduct should be regulated and what procedures are to be followed. Since 1965, Congress has provided that any attorney in good standing may represent a party in matters before a federal agency.[1] Nevertheless, there is widespread agreement that agencies ought to have authority to discipline attorneys to maintain the integrity of their own proceedings, and agencies should be able to discipline attorneys who have already been subjected to sanctions by state bar authorities. Moreover, an agency should be able to discipline an attorney who has been sanctioned by a state bar, even though the attorney is licensed to practice in another state. In addition, the Committee on Governmental Processes believes that an agency ought to be able to discipline attorneys who have been found to violate the substantive laws enforced by the agency, provided that this discipline is imposed only after the existence of a violation has been established in accordance with the usual procedures for determining such violations.

An agency may, of course, refer attorney misconduct cases to state bar authorities either prior to or instead of considering the matter itself. An agency intending to discipline an attorney itself should give special attention to ensuring both fair disciplinary procedures and separation of disciplinary and substantive agency functions.

---

[1] 5 U.S.C. §500. Congress has provided few specific exemptions—notably the Patent and Trademark Office and the Treasury Department. *See* 5 U.S.C. §500(e), 35 U.S.C. §§31–33, and 31 U.S.C. §1026.

Conclusion

The Administrative Conference Committee on Governmental Processes concludes that any current problems arising from the discipline of attorneys by federal agencies are not of such magnitude or so widespread as to require legislative action or a Conference recommended for the adoption of uniform federal standards.

BACKGROUND REPORT FOR ATTORNEYS PRACTICING BEFORE FEDERAL AGENCIES

REGULATION OF ATTORNEYS PRACTICING BEFORE FEDERAL AGENCIES*

*Michael P. Cox***

Table of Contents

I. Regulation of Attorneys Practicing before Federal Agencies
  A. Introduction
  B. Authority of the Federal Government to Regulate Attorneys Practicing before Federal Agencies
  C. Admission Requirements for Attorneys Practicing before Federal Agencies
  D. Standards for Regulation of Conduct of Attorneys Practicing before Federal Agencies
  E. Discipline of Attorneys Practicing before Federal Agencies
  F. Conclusions and Recommendations
II. Appendices
  A. Copies of Questionnaires (State and Federal)
  B. March 10, 1982 Chart: Attorney Misconduct before Eleven Federal Agencies (Prepared by the Director of the ABA Center for Professional Responsibilities)
  C. Selected Bibliography
    1. Statutes
    2. Regulations
    3. Judicial Decisions
    4. Publications

---

* Although this presentation, soon to be published in Case Western Reserve Law Review, Vol. 34, 1984, reflects the contribution of many persons and sources, the views expressed are solely those of the author and should not be attributed, unless otherwise indicated, to particular persons/sources or to the Administrative Conference of the United States. See note 16, infra.

** B.S. 1965, J.D. 1968, University of Kentucky; LL.M. 1974, J.S.D. 1981, Columbia University. Professor of Law, University of Oklahoma College of Law.

Since the 1940's, the subject of regulation of attorneys practicing before federal agencies has been addressed by the Congress and considered by governmental and non-governmental entities on a number of occasions.[1] When the Administrative Procedure Act was enacted in 1946, Section 6(a) of the Act[2] detailed the right to counsel before administrative agencies; however, that section (as well as the entire Act) was silent on regulation of attorneys themselves. The *Attorney General's Manual on the Administrative Procedure Act*[3] explained the omission:

> [S]ection 6(a) leaves intact the agencies' control over both lawyers and non-lawyers[4] who practice before them. The reports of the Senate and House Judiciary Committees contain expressions of opinion to the effect that, as to lawyers desiring to practice before an agency, the agency should normally require no more than a statement from a lawyer that he is in good standing

---

[1] Congressional interest has been extensive and longstanding. In addition to enactment of the "Agency Practice Act of 1965" (5 U.S.C. § 500), numerous other bills have been introduced; see, e.g., S.262, 96th Cong.; S.600 and S.2374, 86th Cong.; HR 6774 and HR 7092, 86th Cong.; S.932, 85th Cong.; HR 3349, HR 3350, and HR 7006, 85th Cong.; S.746, 81st Cong.; HR 4446 and HR 8201, 81st Cong.; HR 2657 and HR 7100, 80th Cong.; S.92, S.572, and S.740, 79th Cong.; HR 339, HR 643, HR 1206, HR 1387, and HR 3089, 79th Cong.; S.1945, 78th Cong.; HR 94, HR 2323, HR 4470, HR 5237, and HR 5277, 78th Cong.; HR 605 and HR 2526, 77th Cong.; HR 4798, 76th Cong.; HR 9635, 75th Cong.; and S.2944, 74th Cong. See also "Ethics in Government Act of 1978" (18 U.S.C. § 207). Of interest with regard to S.262 introduced by Senator Ribicoff in the 96th Congress is the following statement:

> My contact with the subject [*i.e.*, agency discipline of attorneys] came as Chairman of the Coordinating Group on Regulatory Reform of the American Bar Association. . . . The Coordinating Group sought to coordinate the views and efforts of various Sections of the Association in its approach to the regulatory reform legislation then pending in Congress. . . . [T]here appeared in the Bill [*i.e.*, S.262] that was being worked on during 1979 and 1980 by Senator Ribicoff, a provision that sought to deal with this complex question in one sentence. . . . We were unable to persuade the Governmental Affairs Committee to drop that provision from the Bill, but did obtain a commitment from the staff that, in negotiations with the Judiciary Committee which then had a different version of the legislation without such a provision, they would not insist on it—on the understanding that the [ABA] was attending to the subject and the Committee would have the benefit of the results of the ABA deliberations. Since then, of course, the Congress changed as did the regulatory reform legislation, and the subject has not reappeared in Congress.

Letter from Richard B. Smith to author (June 9, 1982), a copy of which is on file with the Administrative Conference of the United States. For a summary of A.B.A. activity during this time period to the present, see notes 10 and 12, *infra*.

[2] 5 U.S.C. § 555 (1976).

[3] The *Attorney General's Manual*, which was drafted when the late Justice Tom Clark was Attorney General, is a contemporaneous interpretation of the APA and has been "given some deference by [the] Court because of the role played by the Department of Justice in drafting the legislation." Steadman v. SEC, 450 U.S. 91, 103 n. 22 (1981), quoting Vermont Yankee Nuclear Power v. Natural Resources Defense Council, Inc., 415 U.S. 519, 546 (1978).

[4] The scope of this presentation does not include consideration of regulation of non-attorneys practicing before federal agencies. That aspect is being studied by Professor Jonathan Rose, Arizona State University College of Law, consultant to the Administrative Conference of the United States; however, reference will be made on occasion to regulation of non-attorneys when appropriate.

> before the courts. . . . However, the legislative history leaves no doubt that the Congress intended to keep unchanged the agencies' existing powers to regulate practice before them. . . . [T]he subject [*i.e.*, regulation of attorneys] should be covered by separate legislation. It is clear, therefore, that the existing powers of the agencies to control practice before them are not changed by the Administrative Procedure Act. For example, an agency may exclude, after notice and opportunity for hearing, persons of improper character from practice before it, or exclude parties or counsel from participation in proceedings by reason of unruly conduct, or impose reasonable time limits during which former employees may not practice before the agency.[5]

As this passage reveals, regulation of attorneys practicing before federal agencies has at least three aspects: admission requirements, rules (or standards) of conduct, and disciplinary action. Because the practice of law in the United States traditionally has been within the province of the various states,[6] an additional inquiry is: To what extent does the federal government have authority—constitutional or otherwise—to impose restrictions on attorneys representing or counselling clients in the federal administrative process? As a consequence, after a brief introduction, authority of the federal government to regulate attorneys practicing before federal agencies will be considered; thereafter, admission requirements, rules (or standards) of conduct, and disciplinary action will be discussed.

INTRODUCTION

On August 11, 1982, the House of Delegates of the American Bar Association (A.B.A.) considered at the Association's Annual Convention two proposals relating to regulation of attorneys practicing before federal agencies. One was recommended by the A.B.A. Standing Committee on Professional Discipline;[7] the other was a recommendation sponsored by ten organizations, nine of which were A.B.A. affiliated.[8] The A.B.A.'s current interest[9] in discipline of attorneys practicing before federal agencies surfaced in early 1979, but intensified on August 5, 1980,[10] when the Association's House of Delegates, upon recommendation of the Standing Committee on Professional Discipline, adopted the following resolution:

---

[5] Attorney General's Manual on the Administrative Procedure Act 65, 66 (1947).

[6] *See, e.g.*, Ohralik v. Ohio State Bar, 436 U.S. 447 (1978); In re Primus, 436 U.S. 412 (1978); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971). *See also* Friedman v. Rogers, 440 U.S. 1 (1979).

[7] Hereinafter referred to as the "Franck Proposal." Michael Franck was the Chair of the ABA Standing Committee during the formulation of the Proposal, which includes "Model Rules for Federal Agency Discipline." A copy of the Franck Proposal is on file with the Administrative Conference of the United States.

[8] Hereinafter referred to as the "Waxman/Forrest Proposal." Margery H. Waxman and Herbert E. Forrest were the principal drafters of the proposal. At the time the proposal was developed, Ms. Waxman was Deputy General Counsel, Dept. of Treasury and Mr. Forrest was a member of Steptoe & Johnson Chartered, Washington, D.C. *See* note 203, *infra*, for a list of the sponsoring organizations. A copy of the Waxman/Forrest Proposal is on file with the Administrative Conference of the United States.

[9] The American Bar Association has periodically shown interest in regulation of attorneys practicing before federal agencies. *See, e.g.*, 1965 U.S. Code Cong. & Admin. News 4179 (1965) (Endorsement of the Agency Practice Act); 81 Reports of the A.B.A. 379–380, 495–496, 514–517 (1956) (Endorsement of the Hoover Commission proposals; *see, e.g.*, note 23, *infra*).

> RESOLVED, That inasmuch as the public interest in the effective administration of justice requires diligent and independent respresentation by counsel, the American Bar Association perceives dangers in the exercise of disciplinary jurisdiction by administrative agencies over lawyers who represent clients with respect to client conduct subject to regulations by those agencies (other than authority immediately necessary to maintain order in or the integrity of proceedings before them); and
>
> RESOLVED, That the American Bar Association undertake the development of a model enforcement mechanism for the discipline of lawyers who

---

[10] Discipline of attorneys practicing before federal agencies appeared as an agenda item for the January 18–20, 1979, meeting of the A.B.A. Standing Committee on Professional Discipline, prompted by an attorney-discipline action before the Interstate Commerce Commission (I.C.C.): *In the Matter of Vandegrift* (No. 352) [*Note*: None of the matters in issue were resolved; the respondent was admonished to correct the deficiencies, if any, in his office procedures.] In general, the Standing Committee noted concern over the lack of uniformity in attorney-disciplinary procedures among the various federal agencies and, specifically, expressed alarm with the ICC's apparent failure to provide respondent Vandegrift with due process and with the Commission's broad claim of attorney disciplinary authority. Shortly thereafter, an S.E.C. (Securities and Exchange Commission) Rule 2(e) disciplinary proceeding against two members of the New York Bar, Messrs. Carter and Johnson, raised similar concerns in the federal securities bar when the administrative law judge (ALJ) in the case recommended on March 7, 1979, that Carter and Johnson be suspended from practice before the S.E.C. because they willfully violated and willfully aided and abetted violations of Sections 10(b) and 13(a) of the Securities Act of 1934 and that they engaged in unethical and improper professional conduct. *See In the Matter of Carter and Johnson*, SEC File No. 3-5464 (Mar. 7, 1979). [*Note*: The Commission reversed the findings of the ALJ and dismissed the proceedings against Carter and Johnson. *See In the Matter of Carter and Johnson* [SEC Release No. 34-17597, Feb. 28, 1981], Fed. Sec. L. Rep. (CCH), No. 903 (Special Edition) (March 6, 1981)]. At an April 20–21, 1979, meeting of the Standing Committee, discussion of agency regulation of attorneys centered not only on the *Vandegrift* case (and a growing concern over the S.E.C. and the implications of *Carter and Johnson*), but also the authority of agencies to discipline attorneys, the standards applicable in attorney disciplinary actions by federal agencies, and the "chilling effect" of an agency being both prosecutor and judge in a disciplinary action. At the June 7–9, 1979, Fifth Annual Workshop on Discipline Law and Procedure held in Chicago, the Chair of the Standing Committee announced that the Standing Committee was undertaking a major effort relating to federal agency attorney discipline. Later that month, the Standing Committee established its subcommittee on federal agency discipline. During the remainder of 1979, the Standing Committee (and the subcommittee) prepared and submitted a recommendation on discipline of attorneys by federal agencies to the A.B.A. House of Delegates in February 1980. The recommendation, however, was withdrawn to allow other ABA entities an opportunity to study and discuss the proposal. A conference to provide a forum for discussion was held in Chicago on March 25, 1980, and a revised recommendation was submitted to the ABA House of Delegates, which adopted the revised recommendation on August 5, 1980 [*see* note 11, *infra* and accompanying text]. This chronology was developed from materials supplied by Timothy K. McPike, Discipline Counsel, Standing Committee on Professional Discipline; a copy of the materials is on file with the Administrative Conference of the United States. *See* note 1, *supra* with regard to discussions between representatives of the ABA and the Congress on pending legislation (S.262, 96th Cong.) during this period.

practice before federal and state administrative agencies, through efforts involving interested administrative agencies and Association entities, to be coordinated by the Standing Committee on Professional Discipline.[11]

Between the summer of 1980 and the summer of 1982,[12] the Standing Committee developed its recommendation, the major portion of which is a set of proposed "Rules for Federal Agency Discipline," forty-six pages of definitions, twenty-four rules, and commentary.[13] In early 1982, a substitute—a document of one and a half pages—to the Standing Committee's proposed rules was developed, circulated, refined, and ultimately endorsed by ten sponsors.[14] In addition to the organized attention given to the subject by the American Bar Association, many individuals have addressed in recent years the considerations, some in general terms and some with regard to specific issues, related to regulation of attorneys practicing before federal agencies.[15]

With the recent increase in interest in regulation of attorneys practicing before federal agencies, a relevant query is: What have the federal agencies done (or not done) to generate the escalation of opposition to agency regulation of attorneys? Many of the comments received and accumulated,[16] as well as the two presented below (without identification of the source or the agency involved[17]) demonstrate the nature and depth of the concern that members of the bar have with federal agencies' regulating attorneys who practice before them:

---

[11] 1980 Summary of Action Taken by the House of Delegates of the A.B.A. 23 (Aug. 5–6, 1980). The language finally adopted by the 1980 House of Delegates varies slightly from that initially recommended by the Standing Committee in its 1980 Report to the House (*See* note 25, *infra*). The wording of the parenthetical in the first Resolved, was amended to include recognition not only of authority "necessary to maintain order in . . . proceedings" but also authority "necessary to maintain . . . the integrity of proceedings." *See* letter to Herbert E. Forrest from Michael Franck (June 4, 1980) and letter to Michael Franck from Marion Edwyn Harrison (June 30, 1980), copies of which are on file with the Administrative Conference of the United States. The 1982 Recommendation of the Standing Committee reverted to its former language, *i.e.*, the "integrity" language was deleted. *See* Franck Proposal, *supra* note 7; however, the Waxman/Forrest Proposal, *supra* note 8, retained the "integrity" language (*see* note 203, *infra*).

[12] The Franck Proposal, *supra* note 7, represents a distillation of views of a number of persons and organizations within and without the A.B.A. Three conferences were held in Washington, D.C. (Sept. 23, 1980; Dec. 16, 1980; and July 20, 1981) to obtain the participants' perspectives and comments on the proposed "Rules for Federal Agency Discipline." In addition, responses were received from numerous individuals and entities on prior drafts of the proposed rules, to include, submissions from a number of the Sections of the A.B.A. and federal agencies, from specialized bars (*e.g.*, the Federal Communications Bar Association and Federal Bar Association), and from the Conference of Administrative Law Judges, as well as from members of the National Organization of Bar Counsel. The Standing Committee submitted its recommendation for consideration to the ABA House of Delegates on Jan. 25, 1982, but withdrew the recommendation for further revision. The final recommendation (the Franck Proposal, *supra* note 7) was submitted to the House of Delegates on August 11, 1982.

[13] *See* Franck Proposal, *supra* note 7.

[14] *See* Waxman/Forrest Proposal, *supra* note 8.

[15] *See* Appendix C, Part 4, *infra*.

[16] This study was undertaken for the Administrative Conference of the United States (ACUS) on April 6, 1982. Published materials, agency rules of practice, decisions of agencies and courts, and the proposals of bar groups and interested persons were reviewed. The textual research was supplemented by letters written to (and responses received from) numerous practitioners, law professors (specializing in administrative law or professional responsibility) and current and past members of ACUS. One Questionnaire was sent to the general counsels and chief administrative law judges of major federal agencies (from lists supplied by ACUS) [Hereinafter referred to as Federal

> We have only this week obtained from the [agency name deleted], under the Federal Privacy Act, the memorandum which formed the basis for the finding of probable cause. . . . It is so vicious, and so wrong-headed in its legal analysis, that we hardly know whether to laugh or cry. It demonstrates anew the dangers of having disciplinary matters handled by bar counsel who are neither impartial nor familiar with the law in the area, and who are not only willing but eager to institute a public proceeding first, and to investigate later.

And,

> I have received information leading me to believe that one agency's disciplinary investigators and counsel encourage attorneys in [agency name deleted], handling unrelated matters in which lawyers who are under disciplinary investigation are opposing them, to look at the files in the disciplinary investigations. The [position of official deleted] was quoted to me as having said, urging a staff attorney to review the file on this adversary, "You should take advantage of every opportunity to learn about your opponent." The staff attorney declined the invitation in this instance, but was it the first time? Or the last?
>
> So we are not just talking about a theoretical or imaginary conflict between regulatory prosecutive zeal and disciplinary confidentiality. The

---

Questionnaire]; a second questionnaire was sent to all state bar counsel [Hereinafter referred to as State Questionnaire]. *See* Appendix A for copies of both questionnaires. [In a number of places in this presentation, reference will be made to the responses received to the State and Federal Questionnaires; however, this information is not considered to be validated statistically, but rather is only an indication of the views of persons closely associated with disciplinary matters (State Questionnaire) or with the federal administrative process (Federal Questionnaire).] Personal interviews were held on June 21, 22, 1982, in Washington, D.C., with persons selected for their expertise and contrasting perspectives on the issues relating to discipline of attorneys practicing before federal agencies. The A.B.A. Annual Convention was attented to observe the debate of the House of Delegates on August 11, 1982, on the Franck Proposal, *supra* note 7 and on the Waxman/Forrest Proposal, *supra* note 8. In addition, numerous persons (to whom appreciation is expressed) furnished copies of correspondence, documents, and other materials relevant to the inquiry.

Special recognition is given to several individuals for their continuous interest and assistance: Howard C. Anderson (Practitioner and Chair, Administrative Law Committee, A.B.A. Section on Public Utilities), Washington, D.C.; Herbert E. Forrest (Practitioner), Washington, D.C.; Paul Gonson (Solicitor, Securities and Exchange Commission), Washington, D.C.; Thomas Lumbard (Practitioner), Washington, D.C.; Timothy K. McPike (Discipline Counsel, A.B.A. Standing Committee on Professional Responsibility, on behalf of Michael Franck, Chair of the Standing Committee), Chicago; and Margery H. Waxman (Deputy General Counsel, Dept., of Treasury), Washington, D.C. Appreciation is also expressed to the University of Oklahoma College of Law (and, in particular to Wayne E. Alley, Dean, and two members of the College's staff, Beverly K. Mitchell and Paula J. Wesson) for the support given to this project.

[17] Copies of the letters quoted are on file with the Administrative Conference of the United States. Although both letters were written in 1979 by the same person, the concerns expressed are not unique to the writer. Similar expressions about agency disciplinary procedures and practices were made to the author in the course of this study.

conflict is not just a potent one, inherent in the structure; it is real. That lawyers acting as agency bar counsel would countenance such shenanigans makes my blood boil.

To understand why the American Bar Association and individual members of the bar are at odds with federal agencies over agency regulation of attorneys, one should analyze four areas: the authority of the federal government to regulate attorneys practicing before federal agencies;[18] admission requirements for attorneys practicing before federal agencies;[19] standards for regulation of conduct of attorneys practicing before federal agencies;[20] and discipline of attorneys practicing before federal agencies.[21] Only after one has completed these analyses, can one appreciate the competing factors and interests that one must balance to reach conclusions and make recommendations[22] on how the controversy can be resolved.

Authority of the Federal Government to Regulate Attorneys Practicing before Federal Agencies

A basic question that comes to mind when one inquires into the authority of the federal government to regulate attorneys practicing before federal agencies is: Why does the federal government want (or feel compelled) to assume responsibilities normally performed by state bar counsel and state licensing authorities? Although other reasons may exist, a very simple (and, if true, persuasive) answer can be given. A jurisdictional gap has developed with regard to discipline of attorneys practicing before federal agencies:

> An attorney practicing before Federal agencies may escape effective disciplinary action by the courts of his State because of his absence from that jurisdiction. Such an attorney in the Federal administrative practice who moves to Washington, D.C., often cuts all ties with the State which has admitted him to the practice of law. Only in exceptional cases is such an attorney likely to be subject to disciplinary proceedings in that State for unprofessional conduct before Federal agencies in Washington. Moreover, disciplinary proceedings will not be available against him in the District of Columbia where he is not a member of the bar of any trial court in the District. The result is a hiatus in the effective disciplining of many lawyers in the Administrative Law practice.[23]

---

[18] *See* notes 23 et seq., *infra* and accompanying text.

[19] *See* notes 65 et seq., *infra* and accompanying text.

[20] *See* notes 118 et seq., *infra* and accompanying text.

[21] *See* notes 201 et seq., *infra* and accompanying text.

[22] *See* notes 245 et seq., *infra* and accompanying text.

[23] Commission on Organization of the Executive Branch of Government, Task Force Report on Legal Services and Procedure 308 (1955); *See also* Commission on Organization of the Executive Branch of Government, Commission Report on Legal Services and Procedure 38 (1955). To eliminate this "hiatus," the Hoover Commission included as Recommendation 26:

> An attorney-at-law who has the privilege of representation before any agency of the United States should be subject to disciplinary control (1) by a Federal Grievance Committee through proceedings in a United States district court, and (2) by each agency, with authority to suspend him from practice before that agency for not more than one year.

Even though this statement was made in 1955 by the Hoover Commission Task Force, the Clark Committee reached the same conclusion in 1970,[24] and similar indications were contained in the 1980 report accompanying the ABA Standing Committee on Professional Discipline's recommendation to the Association's House of Delegates.[25] The House of Delegates adopted the recommendation and tasked the Standing Committee to develop "a model enforcement mechanism for the discipline of lawyers who practice before federal . . . agencies."[26] As a consequence, one could argue if disciplinary mechanisms in the various states were, in fact, effective in processing allegations of attorney misconduct before federal agencies, a need would not exist for federal disciplinary actions against attorneys, except perhaps with regard to conduct involving contumacious behavior committed in the course of an agency proceeding (*e.g.*, misconduct committed in the physical presence of the agency).[27]

Commission Report at 40. With regard to the authority of the District of Columbia Court of Appeals Committee on Unauthorized Practice of Law to investigate persons not licensed to practice in the District, see Simons v. Bellinger, 643 F.2d 774 (D.C. Cir. 1980).

[24] A.B.A. Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement 67–70 (Final Report/June 1970) [Clark Report].

[25] Hereinafter referred to as "1980 ABA Standing Committee Report," a copy of which is on file with the Administrative Conference of the United States. *Id.* at 4, 5 observes:

> Lawyer discipline has traditionally been left to the principal jurisdiction of the several states. But several potential problems arise in merely relying upon existing mechanisms for disciplinary enforcement to govern practice before administrative agencies notably:
>
> 1. The extent to which state disciplinary agencies lack adequate staff and financial resources to serve as the principal vehicles for administrating discipline over federal agency practitioners.
>
> 2. The extent to which the high degree of expertise often involved in administrative agency practice, and disciplinary matters arising therefrom, might require that the customary state agency structure be supplemented.

[26] *See* note 11, *supra* and accompanying text. In 1981 the General Counsel and Solicitor of the Securities and Exchange Commission agreed that some mechanism beyond state disciplinary proceedings is required to regulate effectively attorneys practicing before federal agencies:

> [S]tate and local bar authorities traditionally have held—and still hold—the primary responsibility for the discipline of lawyers. However, as a growing number of lawyers engage in an essentially federal practice, there is a greater need of complementary disciplinary authority that focuses primarily on federal practice. . . . [M]any state disciplinary authorities lack extensive budgets, staff and federal expertise. It is fair to state that misconduct in federal practice may receive a low priority among the numerous competing local issues.

Letter from Ralph C. Ferrara and Paul Gonson to Michael Franck (March 19, 1981), a copy of which is on file with the Administrative Conference of the United States.

[27] At least two other categories of misconduct may exist which could be handled by federal agencies: that committed while in a representative capacity, but not necessarily in the physical presence of the agency (*i.e.*, involving the integrity of the agency process) [*See, e.g.*, Koden v. U.S., 564 F.2d 228 (7th Cir. 1977); Kivitz v. S.E.C., 475 F.2d 956 (D.C. Cir. 1973)] and that involving the failure of an attorney to fulfill an agency's special concept of professional responsibility relating to the the agency's substantive regulatory responsibilities which may or may not involve representation of a client before the agency [*see, e.g.*, In re Matter of Carter and Johnson, [SEC Release No. 34-17597, Feb. 28, 1981], Fed. Sec. L. Rep. (CCH), No. 903 (Special Edition) (March 6, 1981) and S.E.C. v. National Student Marketing Corp., 457 F. Supp. 682 (D.D.C. 1978)]. Although independent analysis may have developed a similar classification of attorney misconduct

Since effective state regulation of attorneys practicing before federal agencies continues to be undocumented[28] and since a need exists for attorneys practicing before federal agencies to be subject, in fact, to some regulatory authority, the initial concern to be addressed is: If the States are arguably unable to be the regulator, does authority exist for the federal government (or more precisely, in federal agencies) to assume responsibilities in this specialized attorney-discipline area? Several arguments of constitutional dimension have been proffered with regard to the lack of authority of the federal government to regulate attorneys practicing before federal agencies: One denies the existence of any power on the part of the federal government to regulate,[29] the other only challenges the authority of federal agencies themselves to regulate.[30]

The former proceeds on the basic premise that regulation of the practice of law resides in the judicial branch of government—whether that be state or federal—and, thus, only state and federal courts have the power to regulate attorneys within their respective jurisdictions. Although administrative agencies have "quasi-judicial" aspects, they are (according to this line of argument) not courts and, therefore, do not possess inherent authority, as do courts, to regulate

---

before agencies, these distinctions were suggested in an October 1979 Draft Position Paper, A.B.A. Subcommittee on Federal Agency Discipline of the Standing Committee on Professional Discipline, a copy of which is on file with the Administrative Conference of the United States.

[28] In addition to the observations made by the Hoover Commission Task Force (note 23, *supra*), the Clark Committee (note 24, *supra*) and the ABA (note 25, *supra*), the responses received to the State Questionnaire (see Appendix A, *infra*) sent to state bar counsels (*i.e.*, the state officials with responsibility for investigating and processing complaints against attorneys), reinforce the perception that state disciplinary systems may not currently be effectively regulating attorneys who practice before federal agencies. For example, of the thirty-six jurisdictions (thirty-five states, and the District of Columbia) which responded, over one third indicated that they did not have (or had reservations about) the ability to pursue misconduct by attorneys licensed by their states committed outside their states before federal agencies. Although the complement must be weighed (*i.e.*, almost two-thirds of the states responding felt confident in their ability (with current resources and level of interest) to pursue attorney misconduct by their licensed attorneys committed outside of their states before federal agencies), a substantial gap would seem to exist with regard to effective regulation of attorneys practicing before federal agencies. The responses to the State Questionnaire, therefore, confirm the conclusion, reached by the Hoover Commission, the Clark Committee, the A.B.A., and a number of federal agencies that doubt exists as to the states' ability to regulate attorneys effectively, at least where the misconduct before federal agencies occurs outside the licensing state. On the other hand, over 97% of the responding bar counsels indicated that they had the interest and resources to pursue misconduct before federal agencies committed by their attorneys within their states. Only twenty-two percent of the responding states listed any referrals from federal agencies in recent years of attorney misconduct; however, forty-two percent failed to respond to the request for this information or indicated that a response would not be provided because of unavailability of data. Twenty-eight percent indicated no referrals from federal agencies and the remaining eight percent of the responses were ambiguous; one state indicated a complaint against an agency attorney.

[29] For a presentation of this argument, *see, e.g.*, Letter to Honorable John C. Culver from Thomas Lumbard (August 31, 1979), a copy of which is on file with the Administrative Conference of the United States.

[30] *See, e.g.*, 1980 ABA Standing Committee Report, *supra* note 25 and Franck Proposal, *supra* note 7.

attorneys.[31] Legislatures (including the Congress), the analysis continues, have no authority to participate in the regulation of the legal profession except perhaps in aid of the judiciary in the performance of its responsibility.[32] Consequently, since regulation of attorneys practicing before federal agencies arguably is not within the inherent power of Article III courts (because representation before agencies does not involve practice before Article III courts, except on those occasions when review of agency action is sought), since the Congress (as a legislative body) has no inherent authority to regulate the practice of law, and since the Constitution does not expressly allocate the function of regulating attorneys, the Tenth Amendment[33] requires the responsibility remain with the various states. As a power "reserved to the States," therefore, the Congress would lack authority to delegate responsibilities with regard to regulation of attorneys practicing before federal agencies, either expressly or impliedly, to any instrumentality of the federal government. If one accepts this analysis, no authority would reside in the federal government to regulate attorneys practicing before federal agencies (unless, of course, Article III courts were to claim authority as part of their inherent powers).

Although this rationale might be persuasive on a theoretical basis, the practicalities of the situation (*i.e.*, decades of Congressional action,[34] as well as numerous judicial decisions recognizing, or at least acknowledging, authority in the federal government to regulate attorneys practicing before federal agencies[35]) would have to be ignored. The likelihood that the federal courts (or the Congress) would disregard this long-standing, consistent judicial and Congressional precedent and deny (or disclaim) the federal government's authority to regulate attorneys practicing before federal agencies seems extremely remote.

---

[31] *See, e.g.*, Camp v. Herzog, 104 F. Supp. 134, 136 (D.D.C. 1952): "Undoubtedly the power to control, by admission and disciplinary action, persons who appear before an administrative agency as representatives of the parties at interest is a highly important one, but it is not as is the case in judicial courts of general jurisdiction, an inherent power, but is one which, if it exists, is given by the legislative authority creating such agency; Keating, Muething & Klekamp, 45 Ad.L.2d 1072, 1080–81 n. 11 (1979) (Dissent of Commissioner Karmel):

> General jurisdiction to regulate the conduct of attorneys resides in the courts and its delegated authorities. The Securities and Exchange Commission is neither a court nor a designated authority of a court. Although it may act as a tribunal in adjudicatory proceedings, it is primarily a prosecutorial and rule making body. The power of a federal administrative agency to control by disciplinary action attorneys who appear before it is not, as it is with a court of general jurisdiction, an inherent general power. To the extent the power exists, it is given by the legislature to such an agency. Absent a specific grant of statutory authority, the disciplining of attorneys traditionally has been the responsibility of the judiciary. To the extent the Commission disciplines attorneys, it impinges upon the authority of the federal and state courts to regulate the conduct of the bar.

[32] *See, e.g.*, Note, *Representation of Clients before Administrative Agencies: Authorized or Unauthorized Practice of Law?*, 15 Val. U. L. Rev. 567, 584–99 (1981) wherein four theories of legislative power with regard to regulation of the legal profession are discussed: judiciary and legislature have concurrent jurisdiction; legislature may pass laws in aid of the judiciary; legislature has no jurisdiction; and legislature is supreme, with the judiciary secondary.

[33] U.S. Const. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[34] *See, e.g.*, express grants of authority: 31 U.S.C. § 1026 (1976) (Treasury); 35 U.S.C. §§ 31, 32 (1976) (Patent Office); 43 U.S.C. § 1464 (1976) (Interior/Public Lands). In addition, Congress in 1965 enacted the "Agency Practice Act," 5 U.S.C. § 500 (1976).

The other agrument with constitutional underpinnings (*i.e.*, no authority exists in federal agencies to regulate attorneys) rests primarily on an alleged impermissible combining of functions in violation of due process[36] (and, to a lesser extent, on a claim of an unconstitutional interference with the attorney/client relationship to such an extent as to deny effective counsel).[37] The argument has been stated concisely, although without identifying its constitutional aspects clearly, by the ABA Standing Committee on Professional Discipline in its 1982 Report to the Association's House of Delegates:

---

[35] *See, e.g.*, Sperry v. Florida ex rel. Florida Bar, 373 U.S. 379 (1963); Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1926); Touche Ross & Co. v. S.E.C., 609 F.2d 570 (2d Cir. 1979); Koden v. U.S. Department of Justice, 564 F.2d 228 (7th Cir. 1977); Herman v. Dulles, 205 F.2d 715 (D.C. Cir. 1953); Schwebel v. Orrick, 153 F. Supp. 701 (D.D.C. 1957); Camp v. Herzog, 104 F. Supp. 134 (D.D.C. 1952); Phillips v. Ballinger, 37 App. D.C. 46 (1911); Garfield v. United States ex rel. Stevens, 32 App. D.C. 109 (1908). Although the *Sperry* and *Goldsmith* cases involved non-attorneys (patent agent and certified public account, respectively), the Court, albeit in dictum, clearly recognized the authority of the federal government to regulate the practice of law, and, thus, impliedly acknowledged the regulation of *attorneys*, as well as *non-attorneys*. *Sperry* at 383, 384, 388, 403: "We do not question the determination that under Florida law the preparation and prosecution of patent applications for others constitutes the practice of law. . . . Nor do we doubt that Florida has a substantial interest in regulating the practice of law within the State and that, in the absence of federal legislation, it could validly prohibit non-lawyers from engaging in this circumscribed form of patent practice. But 'the law of the State, though enacted in the exercise of powers not controverted, must yield' when incompatible with federal legislation. . . . We find implicit in this history congressional (and administrative) recognition that registration in the Patent Office confers a right to practice before the Office without regard to whether the State within which the practice is conducted would otherwise prohibit such conduct. . . . Congress having acted within the scope of the powers 'delegated to the United States by the Constitution,' it has not exceeded the limits of the Tenth Amendment despite the concurrent effects of its legislation upon a matter otherwise within the control of the State." *Goldsmith* at 122: "Our view . . . [is] that the general words by which the Board is vested with authority to prescribe the procedure in accordance with which its business shall be conducted include as part of the procedure rules of practice for the admission of attorneys." *See* note 64, *infra*.

[36] The contention is that combining functions, *e.g.*, client regulatory responsibilities and disciplinary power over attorneys, in the same agency would create an unconstitutional risk of bias in the administrative process in violation of U.S. Const. amend. V. *See* Larkin v. Withrow, 421 U.S. 35 (1975); but *cf*. Hortonville Joint School Dist. No. 1 v. Hortonville Education Ass'n., 426 U.S. 482 (1976).

[37] Roberta Karmel observed after she left her position as an SEC Commissioner: "Although it may surprise some, the courts of law have found that the various protections in the Bill of Rights apply to businessmen and corporations as well as to others. For example, to be represented by effective counsel, and to be protected from forms of self-incrimination are rights shared also by the business community. Moreover, the client's privilege as to confidentiality has been well established in the law and cannot be waived except by the client. The movement to obligate the corporate lawyer to serve public interests beyond and perhaps inconsistent with the clients raises questions of civil liberties which have not as yet been appreciated." Remarks by Roberta S. Karmel, 2d Annual Corporate Counsel Seminar for In-House Counsel (Mar. 6, 1980), a copy of which is on file with the Administrative Conference of the United States. Ms. Karmel seems to be connecting the right to effective counsel and the Bill of Rights, *i.e.*, U.S. Const. amend. I–X. A connection does exist,

> Administrative proceedings put the agency and counsel for the regulated party in an adversarial [sic] position. When one of the parties—the agency—holds power for its staff attorneys to initiate and prosecute allegations of

---

of course, because U.S. Const. amend. VI provides: "In all *criminal* prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." (Emphasis added.) Because regulation of a client is not generally criminal in nature, this provision would not seem to be a constitutional basis for a denial of effective counsel in the administrative process. Although criminal charges could arise out of a client's conduct during the course of regulation, the defense of the client would be in a judicial proceeding in which the Sixth Amendment would be applicable and allegations of interference with the attorney/client relationship by the agency could be raised. *See, e.g.*, Weatherford v. Bursey, 429 U.S. 545 (1977), and the cases discussed therein. If the charges were based on information which resulted from an alleged interference with the attorney/client relationship, this would appear to be a matter of confidentiality and privilege, rather than of constitutional stature. If a criminal prosecution is not involved, a right to counsel may be required by due process (U.S. Const. amend. V), but by no means is a right to counsel inevitably a requisite of administrative due process [*see* Friendly, *Some Kind of Hearing*, 123 U.Pa.L.Rev. 1267 (1975)], although the right may exist by statute [*see, e.g.*, 5 U.S.C. § 555 (1976)]. The concern being voiced, therefore, would not seem to be necessarily of constitutional dimension, but rather one, as stated, of confidentiality and privilege. When Ms. Karmel made her remarks in 1980, she did not have the benefit of a major Supreme Court decision on corporate attorney/client relationship with regard to a federal agency (in this case the I.R.S.)—Upjohn Company v. U.S., 449 U.S. 383, 389–90, 393 n. 2 (1981):

> Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. . . . Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client. . . . Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation . . . and the Government does not contest the general proposition. . . .
>
> The Government argues that the risk of civil or criminal liability suffices to ensure that corporations will seek legal advice in the absence of the protection of the privilege. This response ignores the fact that the depth and quality of any investigations, to ensure compliance with the law would suffer, even were they undertaken. The response also proves too much, since it applies to all communications covered by the privilege: an individual trying to comply with the law or faced with a legal problem also has strong incentive to disclose information to his lawyer, yet the common law has recognized the value of the privilege in further facilitating communications.

Nowhere in the opinion of the Court sustaining the client's assertion of the privilege to the IRS's administrative request for confidential information did Justice Rehnquist elevate the issues being discussed to a constitutional level. At this point in time, therefore, little authority would appear to support an argument of a right to effective counsel before federal agencies in constitutional terms. The argument would seem more properly made to the Congress to seek elimination by statute of agency interference with the attorney/client relationship. *See* notes 118 *et seq.*, *infra* and accompanying text.

> impropriety in the way their adversary—counsel for the other party—opposed the agency or otherwise acted on behalf of his/her client, and the agency itself decides the merits of the charges brought by its own staff and determines the discipline to be imposed on its adversary, the chilling effect is clear. The merger of substantive and disciplinary powers in the same agency distinguishes this structure from one in which a licensing agency not involved in the substance of the underlying matter investigates allegations of a licensee's misconduct and, where warranted, prosecutes and adjudicates formal charges. The latter is the conventional disciplinary process with which we are all familiar, which has been held not to violate due process in the absence of a showing of actual bias. *Withrow v. Larkin*, 421 U.S. 35 (1975).

The merger of substantive and disciplinary jurisdiction in the same administrative agency poses a two-fold threat of serious harm to the client.

First, the lawyer's disclosures about the representation which are required to defend against the misconduct charges must be made, not to disciplinary counsel disinterested in the underlying client matter, but to employees of the client's adversary, the agency. The disclosures thus become available to the agency for use against the client in the underlying matter.[38]

Second, the practitioner who knows that his/her ability to earn a living can be terminated by the very agency he was retained by the client to deal with or resist, may very well temper his/her representation—consciously or unconsciously—to a level of vigor and diligence less than the client's cause warrants, so as not to arouse the agency's displeasure against himself.

The potential abuse we are dealing with here strikes at the very heart of our system of justice.[39]

This line of reasoning, which would deny authority to federal agencies to regulate attorneys, is not easy to counter. The landmark decision with regard to separation of functions is, as indicated in the 1982 ABA Standing Committee's Report, supra, *Withrow v. Larkin*,[40] a unanimous opinion of the United States Supreme Court. Although not involving the regulation of the practice of law,

---

[38] The denial of effective counsel aspect of the argument was stated more clearly in the 1980 A.B.A. Standing Committee Report, *supra* note 25 at 3: "The administrative agency's claim of disciplinary power over the lawyer who represents the client with respect to the agency threatens the client with loss of access to the independent counsel and vigorous representation which is most needed when a citizen is confronted by the power of government."

[39] Franck Proposal *supra* note 7. *See also*, Keating, Muething & Klekamp, 45 Ad.L.2d 1072, 1080 (1979) (Commissioner Karmel Dissent): "In addition, the potential corruption of justice when an administrative agency with significant prosecutorial responsibilities has the power to sanction an adversary representing and advising a client persuades me that the [Securities and Exchange] Commission should not exercise disciplinary power against attorneys." Commissioner Karmel did qualify her conclusion (*Id.* at 1081): "The Commission, like any other body, may have some need to have and to utilize a disciplinary power against attorneys who practice before it in order to keep its proceedings orderly and dignified."

[40] 421 U.S. 35 (1975).

Withrow does concern a state examining board, empowered to supervise the conduct of, and to impose discipline on, physicians. The rationale of the decision, which sustained a combining of investigative and adjudicative responsibilities, has clear implications with regard to issues under consideration:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a . . . difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented. . . .[41] That is not to say that there is nothing to the argument that those who have investigated should not then adjudicate. The issue is substantial, it is not new, and legislators and others concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive administrative functions should be performed by the same persons. No single answer has been reached. Indeed, the growth, variety, and complexity of the administrative processes have made any one solution highly unlikely. Within the Federal Government itself, Congress has addressed the issue in several different ways, providing for varying degrees of separation from complete separation of functions to virtually none at all. . . .[42] That the combination of investigative and adjudicative functions does not, without more, constitute a due process violation, does not, of course, preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high.[43]

The observations of the 1982 ABA Report, supra, would seem to indicate that "special facts and circumstances" may exist so as to make the "risk of unfairness intolerably high" when an agency has substantive and disciplinary jurisdiction.[44] The second portion of the argument (*i.e.*, denial of effective and independent counsel) flows from a perception that the combination of the two functions—substantive and disciplinary—has such a great potential for abuse that neither the attorney/client relationship nor vigorous and diligent representation can remain unaffected.

---

[41] *Id.* at 47.

[42] *Id.* at 51, 52.

[43] *Id.* at 58.

[44] The Chair of the Standing Committee expressed his concerns as follows: "The Committee believes that there are fundamental constitutional deficiencies in attempts to vest disciplinary jurisdiction over practitioners in administrative agencies which also exercise substantive jurisdiction over the clients those practitioners represent. In consequence, thereof, we believe that any agency discipline structure which permits such a merger of disciplinary jurisdiction over the practitioner and substantive jurisdiction over his client under any circumstances acquiesces in the potential for serious harm to essential client interests and is unacceptable." Letter to Margery H. Waxman and Herbert E. Forrest from Michael Franck (March 16, 1982), a copy of which is on file with the Administrative Conference of the United States.

With regard to these types of concerns, a perceived potential for abuse may be just as damaging to the attorney/client relationship and the vigor of advocacy as verified instances of improper commingling of substantive and disciplinary jurisdiction. Whether specific facts, arising in the context of a particular agency, might cause the Court to find an improper commingling of functions under the standards of *Withrow* is an interesting question, but one only subject to conjecture and not of assistance in this discussion. What does further the analysis is to inquire whether the potential violations of constitutional rights raised by the 1982 ABA Report are inherent in *any* combining of substantive and disciplinary jurisdiction or only exist because of how particular agencies structure their disciplinary systems?[45] The answer to this question is possible within limits.

The Congress has expressly delegated authority (in contra-distinction to the authority being implied[46]) to regulate attorneys to the Patent and Trademark Office[47] and to the Department of the Treasury.[48] Each has well-established procedures for regulation of attorneys and non-attorneys practicing before them.[49]

---

[45] A letter to Marie L. Garibaldi from Myron C. Baum (Jan. 6, 1982) placed the issues raised by the 1/25/82 Franck Proposal, *supra* note 12 in perspective: ''Before we begin a discussion of particular rules, it seems appropriate to consider the problems which the Standing Committee was addressing and the structure which it proposes to deal with those problems. The whole problem of agency discipline, it appears, was generated by a very aggressive attitude on the part of the Securities & Exchange Commission in attempting to regulate in considerable detail the activities of practitioners appearing before the Commission. We are not aware of any other agencies which exhibited similar conduct, and, most notably, we are certainly not aware of any criticism leveled at either the Treasury Department or the Internal Revenue Service in this regard. The first question then is: Does the attitude of one agency require the establishment of a whole disciplinary code for federal agencies with jurisdiction conferred upon district judges and federal magistrates throughout the country and with various bar counsel or other disciplinary authorities given responsibility for enforcement?

''The question is a close one, and, on balance, it may be resolved by stating that if one agency has seemingly tried to overstep the bounds, then another one could do likewise and the need for restraint or impartial administration becomes clearer. Essentially, it is the question of impartial administration which tilts the scales here. If an agency does become too aggressive or oversteps reasonable bounds in promulgating rules of conduct, then certainly the need for separation of the prosecution and adjudication functions from the agency becomes imperative. This is largely what the Code seeks to accomplish. . . .'' A copy of this letter is on file with the Administrative Conference of the United States.

[46] *See, e.g.*, 15 U.S.C. § 78w(a)(1) (1976) (Securities and Exchange Commission) sustained by Touche Ross & Co. v. SEC, 609 F.2d 570 (2d Cir. 1979); Schwebel v. Orrick, 153 F. Supp. 701 (D.D.C. 1957) and 29 U.S.C. § 156 (1976) (National Labor Relations Board), sustained by Camp v. Herzog, 104 F. Supp. 134 (D.D.C. 1952).

[47] *See* 35 U.S.C. §§ 31, 32 (1976). Although the name ''Patent Office'' appears frequently in judicial decisions and the United States Code, the designation has been changed to ''Patent and Trademark Office.'' *See* 35 U.S.C. § 1 (1976).

[48] 31 U.S.C. § 1026 (1976); *See* also 43 U.S.C. § 1464 (1976) for express authorization to another agency: Secretary of Interior with respect to public lands rules and regulations.

[49] Patent and Trademark Office, *e.g.*, 37 CFR § 1.341(a) (admission) and 37 CFR § 1.348 (suspension/disbarment) and Department of Treasury, *e.g.*, 31 CFR, part 8 (practice before the Bureau of Alcohol, Tobacco, and Firearms) and 31 CFR, part 10 (practice before the Internal Revenue Service). The Treasury regulations are enforced by the Director of Practice on a full time basis. The Director's office is located in the Office of the General Counsel, Office of the Secretary of Treasury.

What is interesting, is that the attorneys practicing before these agencies are opposed to the establishment of disciplinary mechanisms separate from these agencies.[50] Although not conclusive, the existence of at least two agencies which have been able to keep their substantive and disciplinary jurisdictions separated, to an extent at least to elicit support of those affected, would seem to indicate that the potential problems perceived by the 1982 ABA Report are not inherent, but structural. If this conclusion is, in fact, valid,[51] the concern should not be with the delegation of combined authority, but rather how that authority is separated within a particular agency structure. As a consequence, the appropriate course of action would seem not to be invalidation (or withdrawal) of the delegation of both substantive and disciplinary jurisdiction to the same agency, but would be to challenge the structure within individual agencies with regard to how attorneys are regulated.

---

[50] Little criticism by attorneys practicing before the I.R.S. with regard to the processing of attorney discipline cases by the Office of the Director of Practice has been identified by this study. With respect to the Patent and Trademark Office, *see* Resolution 502-4 of the Patent, Trademark and Copyright Section of the American Bar Association, adopted unanimously at the Association's 1981 Annual Meeting supporting continued authority in that Office to regulate attorneys.

[51] The Chair of the ABA Standing Committee on Professional Discipline would, for example, question its validity: "While we acknowledge . . . that lawyers who practice before the Department of Treasury and the United States Patent Office appear to be satisfied with the manner in which those agencies are currently carrying out their responsibilities, that seems to us to be no answer to the potential for abuse inherent in a merged structure. We believe that client interests require structural protection against potential abuses rather than mere reliance upon the good judgment of those who at the moment administer the system. . . . Your apparent willingness to abdicate any judgment concerning the desirability of permitting exemptions for some agencies and which agencies should be so exempt to the Congress without Bar further input further troubles us." Letter from Michael Franck to Margery H. Waxman and Herbert E. Forrest (March 16, 1982), a copy of which is on file with the Administrative Conference of the United States. One response to the ABA's concern about the "potential for abuse inherent in a merged structure" was given almost two years earlier by Professor Robert Hamilton (University of Texas) when requested by Mr. Forrest to comment upon a similar argument contained in the 1980 Standing Committee's Report, *supra* note 25. Professor Hamilton observed: "Throughout, the report ignores the most basic conceptions about separations of functions within federal agencies that permit the agency to perform simultaneously adjudicative and prosecutorial functions without the latter infecting the former with bias or prejudice. . . . [T]he reasoning and argument adopted in this report is so wide of the target that it could be used without change to support the proposition that adjudicative and prosecutorial functions should never be combined in a single agency. The ABA lost that fight in the 1930s and 1940s and it is silly to use the same broad and unpersuasive arguments today when seeking to support a much narrower position." Letter from Robert H. Hamilton to Herbert E. Forrest (May 12, 1980), a copy of which is on file with the Administrative Conference of the United States. Mr. Franck, *supra* also attempts to diminish the significance of the Patent and Trademark Office's and the Treasury Department's successful separation of substantive and disciplinary functions by associating their current structure with current personnel: ". . . the good judgment of those who at the moment administer the system." This overlooks the fact that the Patent and Trademark Office has been regulating persons practicing before the Office since 1861 (*see* Act of March 2, 1861, c.88, § 8, 12, Stat. 247); that Treasury's authority was enacted in 1884 (*see* Act of July 7, 1884, c.334, § 3, 23 Stat. 258); and that the United States Supreme Court almost twenty years ago in Sperry v. Florida, 373 U.S. 379 (1963) extensively reviewed the authority of the Patent and Trademark Office to regulate persons practicing before the office and found its exercise not wanting. Lastly, the criterion with regard to whether a merger of functions in an agency violates due process is not one of a potential danger without specific, validating facts but rather, in the words of the *Withrow* Court, the "contention that the combination of investigative and adjudicative functions *necessarily* creates an unconstitutional risk of bias in administrative adjudication has a . . . difficult burden of persuasion to carry. . . . [A] court [must determine] from the special facts and circumstances . . . that the risk of unfairness is intolerably high." (Emphasis added.) Withrow v. Larkin, 421 U.S. 35, 47, 58 (1975) [*See* notes

A final argument[52] that can be formulated with regard to the authority of federal agencies to regulate attorneys centers around the distinction between whether the authority is express (as with the Patent and Trademark Office and the Treasury Department) or has been implied (*e.g.*, as with the S.E.C. and N.L.R.B.).[53] The basic hypothesis of this argument is simple: The power to regulate attorneys practicing before federal agencies must be express and may not be implied.[54]

In *Goldsmith v. United States Board of Tax Appeals*[55] the Court found no express authority had been given by the Congress to the Board (a federal agency), but the justices implied "authority to prescribe . . . rules of practice for the

---

41–43, *supra* and accompanying text]. With the precedents of the Patent and Treasury experiences, and without presentation of specific facts demonstrating abuse generally throughout the federal administrative process with regard to agency regulation of attorneys, arguments based on "potential for abuse" do not, without more, seem to satisfy the *Withrow* standard for violation of due process.

[52] Another aspect of which agencies have (or should have) authority to discipline persons practicing before them was raised in the initial stages of what eventually became the Waxman/Forrest Proposal, *supra* note 8: "[I]n the case of at least two federal agencies, the Internal Revenue Service and the Patent [and Trademark] Office, the Congress has specifically addressed itself to the requirements of practice, and has authorized those agencies to promulgate and enforce specialized standards of conduct and to discipline attorneys." [This Congressional action was then explained by the following footnote:] "The rationale for a separate set of discipline rules for these agencies is particularly strong because the Congressional grant of authority to the Secretary of the Treasury to suspend or disbar practitioners before the IRS covers CPA's and enrolled agents (anyone admitted to practice before the IRS who is not an attorney or CPA) as well as attorneys, providing consistency of treatment for all practitioners, and Patent Office practice also includes practitioners who are not attorneys." Draft Report to House of Delegates pp. 10, 11 (Attachment to March 5, 1982, Memorandum by Margery Waxman and Herbert E. Forrest), a copy of which is on file with the Administrative Conference of the United States. This observation was criticized by the Chair of the ABA Standing Committee on Professional Discipline: "Parenthetically, the rationale you advance for granting two specific agencies exemptions from the prohibition against the merger of disciplinary and substantive jurisdiction in the same agency threatens to swallow the general rule. There are after all many agencies in addition to those two before whom both lawyers and non-lawyers practice, including agencies who in our judgment have exercised the merged jurisdiction they claim they possess in a manner reflecting seriously inadequate sensitivity to the client interest at stake." Letter to Margery H. Waxman and Herbert E. Forrest from Michael Franck (March 16, 1982), a copy of which is on file with the Administrative Conference of the United States. The Waxman/Forrest Proposal, *supra* note 8 rephrased this rationale for treating the IRS and the Patent and Trademark Office differently than other agencies: "One justification suggested is that practice before both these agencies is conducted by many practitioners who are not attorneys." Waxman/Forrest, *supra* note 8 at 8.

[53] *See* note 46, *supra*.

[54] *See, e.g.*, Touche Ross & Co. v. SEC, 609 F.2d 570, 578 n. 13 (2d Cir. 1979) and Letter to William Warfield Ross from Thomas Lumbard (Jan. 11, 1979), a copy of which is on file with the Administrative Conference of the United States.

[55] 270 U.S. 117 (1926).

admission of attorneys.''[56] *Goldsmith*, therefore, would seem to be dispositive of the argument—the authority may be implied. In 1965, however, almost forty years after the decision, the Congress enacted the Agency Practice Act[57] which, with the exception of the Patent and Trademark Office, removed the authority of agencies to set admission requirements.[58] In addition the Act contained, what has subsequently turned out to be, a somewhat ambiguous provision:

> This section does not . . . authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency.[59]

The reasoning behind the argument that after the Agency Practice Act (*i.e.*, 1965), the implied authority of federal agencies to regulate attorneys ceased to exist has been summarized concisely:

> Whatever Congress [sic] thought it was doing, there is a respectable body of law [no citations given] indicating that, by depriving the agencies of the power to refuse to allow attorneys to practice before them Congress implicitly deprived them of the concomitant power to exclude attorneys from such practice, or to impose other discipline on attorneys. A number of cases hold that a court of limited jurisdiction, which is required to allow members in good standing of another court to practice before it, has no power to impose discipline, *qua* discipline, although it may exclude lawyers from proceedings in which they misbehave.[60]

Stated more simply, to have the power to discipline, one must have the power of admission. This argument was expressly rejected in 1979 by the Court of Appeals in *Touche Ross & Co. v. SEC*,[61] on the basis of statutory interpretation and legislative history.[62] Another line of analysis points up the shortcomings of the argument. The analogy made in the argument is to the authority of a court, *i.e.*, the judicial power to regulate attorneys; however, that may not be the power present in this situation. If the authority to regulate attorneys practicing before federal agencies is in the Congress, the issue is one of delegation (*i.e.*, May the Congress delegate all or a portion of the function? & Has the Congress used appropriate standards in the delegation?) and not a question of separation of powers.

---

[56] *Id.* at 122; *see* note 64, *infra*.

[57] Act of Nov. 8, 1965, P.L. 89-332, 79 Stat. 1281, *codified as* 5 U.S.C. § 500 (1976). This Act will be discussed in greater detail; *see* notes 65 *et seq.*, *infra* and accompanying text.

[58] See 5 U.S.C. §§ 500(b) and (e) (1976); the text of § 500(b) is at note 68, *infra*.

[59] 5 U.S.C. § 500(d)(2) (1976).

[60] Letter to William Warfield Ross from Thomas Lumbard (Jan. 11, 1979), a copy of which is on file with the Administrative Conference of the United States.

[61] 609 F.2d 570 (2d Cir. 1979).

[62] *Id.* at 578 n. 13:

> Appellants contend that the enactment in 1965 of 5 U.S.C. § 500, eliminating federal agency practice *admission* requirements, demonstrates the intent of Congress to strip the SEC of any authority to discipline professionals practicing before it. The stated purpose of the section was quite to the contrary. It was intended to ensure that persons appearing before the agencies *be represented by attorneys of their choice*. H. R. Rep. No. 1141, 89th Cong., 1st Sess. (1965), *reprinted in* [1965] U.S. Code Cong. & Ad. News 4170, 4171. Moreover, the statute explicitly provides in § 500(d)(2) that the section ''*does not* . . . authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency. . . .'' (emphasis added). We find nothing in this language to support appellants' contentions. The language, as appellants acknowledge, is ''neutral.'' It neither authorizes nor limits the power of the agencies to discipline professionals who appear or practice before them; that was not the purpose of the section. And there certainly is nothing to suggest that Congress intended to limit disciplinary proceedings to those agencies with specific statutory authorization to do so. *See, e.g.*, 111 Cong. Rec. 27193 (Oct. 18, 1965); S. Rep. No. 755, 89th Cong., 1st Sess. 5 (1965), *reprinted in* [1965] U.S. Code Cong. & Ad. News 4170.

In *Sperry v. Florida*[63] the Court concluded its opinion sustaining the authority of the Patent and Trademark Office to regulate the persons practicing before it with the following statement: "Finally, § 31 [*i.e.*, 35 U.S.C. § 31: Regulations for agents and attorneys] contains sufficient standards to guide the Patent Office in its admission policy to avoid the criticism that *Congress* has improperly delegated *its* powers to the administrative agency."[64] (Emphasis added.) One can reasonably conclude that the Court is indicating that the authority to set admission requirements (*i.e.*, the first aspect of the regulation of the practice of law) is one of the powers of the Congress—that is, a power which remains with the Congress unless effectively delegated. If, in fact, the Congress is the branch of the federal government with the responsibility, one can reason further that the Congress has authority to delegate all or part of that power, constrained only by the requirement that appropriate standards be set. Thus, when the Congress withdrew the power from federal agencies in 1965 to set admission requirements (save for the Patent and Trademark Office), the other aspects of the power to regulate attorneys (*i.e.*, authority to promulgate standards and to discipline) remained in the agencies to the extent previously delegated. As a consequence, the Agency Practice Act arguably did not affect the ability of federal agencies to base their authority to regulate attorneys (except for admission requirements) on an implied delegation from Congress.

---

[63] 373 U.S. 379 (1963).

[64] *Id.* at 403, 404. Although the authority of the Congress to regulate persons practicing before the Patent and Trademark Office is buttressed by U.S. Const. Art. I, § 8, Cl. 8 ["The Congress shall have Power . . . To promote the Progress of Science and useful arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"] and although *Sperry* discussed extensively the relationship of the Congress and the Patent and Trademark Office, the Court's statement should not be discounted as precedent for Congressional authority to regulate persons practicing before administrative agencies in general. For example, in Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1926) wherein the Court sustained the implied power of the Board to prescribe rules of practice for the admission of persons practicing before the Board (in *Goldsmith*, accountants), the Court used language (albeit dictum) which acknowledged the authority of Congress to delegate the power to regulate attorneys to an agency: "[I]t is urged . . . that it was not intended by Congress to give it [the Board] the power. Our view, on the contrary, is that . . . the general words by which the Board is vested with the authority to prescribe the procedure in accordance with which its business shall be conducted include as part of the procedure rules of practice for the admission of attorneys." *Id.* at 122. *Goldsmith* made no reference to U.S. Const. Art. I, § 8, Cl. 1 [Congressional "Power to lay and collect Taxes"]. Although *Sperry* and *Goldsmith* involve agencies delegated express constitutional, Congressional powers, one can argue that this is a distinction without significance. All Congressional delegations to agencies are "constitutionally" authorized, either expressly or impliedly; otherwise, the delegation would be impermissible.

Although other arguments challenging federal agencies' authority to regulate attorneys may exist (or be constructed) and although the analyses of those set out, *supra*, may not be without fault, a reasonable conclusion would seem to be that the federal government (specifically, the Congress) has authority to regulate attorneys practicing before federal agencies and that in a number of instances this power has been delegated, either expressly or impliedly, to various federal agencies. Consequently, consideration now turns to the three aspects of regulating attorneys practicing before federal agencies: admission requirements, standards of conduct, and disciplinary action to determine whether federal agencies have been acting unconstitutionally, *ultra vires*, or otherwise improperly in their regulation of attorneys, and if problems (whether practical or theoretical) exist, what corrective action should be taken.

Admission Requirements for Attorneys Practicing before Federal Agencies

In 1965, the Congress enacted the Agency Practice Act[65] in order "to provide, as far as practicable, for the right of persons to be represented by any attorney in good standing in matters before Federal agencies. The bill [does] away with agency established admission requirements for licensed attorneys, and thus [allows] persons to be represented before agencies by counsel of their choice."[66] The Act provides, *inter alia*: "An individual who is a member in good standing of the bar of the highest court of a State[67] may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts."[68] The Congress included in the Act, however, four limitations to this provision which affect attorneys, *i.e.*, the section does not

> [1] authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency; . . .
>
> [2] authorize an individual who is a former employee of an agency to represent a person before an agency when the representation is prohibited by statute or regulation; . . .

---

[65] Act of Nov. 8, 1965, 89th Cong., P.L. 89-332, 79 Stat. 1281, codified as 5 U.S.C. § 500 (1976).

[66] H.R. Rep. No. 1141, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News 4171 (1965). Prior to the Act a number of agencies had admission requirements which restricted the right to practice before federal agencies. *See* F. Vom Baur, Standards of Admission for Practice Before Federal Administrative Agencies (1953) (Sponsored by the Survey of the Legal Profession, Under the Auspices of the American Bar Association); Henley, *Admission of Attorneys to Practice before Federal Administrative Agencies*, 24 I.C.C. Prac. J. 1198–1206 (1957). In 1957, the Justice Department recommended that agencies abolish admission requirements which most did by 1965. When the Congress considered enacting the Agency Practice Act, only Treasury and the Patent Office raised objections to eliminating their admission to practice requirements. *See* 1965 U.S. Cong. & Admin. News 4171.

[67] 5 U.S.C. § 500(a)(2) (1976) defines "state" as "a State, a territory or possession of the United States including a Commonwealth, or the District of Columbia."

[68] 5 U.S.C. § 500(b) (1976).

> [3] prevent an agency from requiring a power of attorney as a condition to the settlement of a controversy involving the payment of money. . . . [; or]
>
> [4] apply to practice before the Patent Office with respect to patent matters that continue to be covered by chapter 3 (sections 31–33) of title 35.[69]

The first of these limitations will be considered in detail, *infra*,[70] and the fourth seems self-explanatory.[71]

The second limitation was placed in the Act to permit agencies to deal with the so-called ''revolving-door'' practice of persons employed in the federal government, *e.g.*, ''many government attorneys . . . choose not to make government service a career and enter or return to private practice. This flow of attorneys benefits the government by bringing seasoned lawyers and enthusiastic law school graduates into public service, and gives attorneys an opportunity to acquire expertise and skills that can benefit their subsequent private practice.''[72] Although some agencies have promulgated rules restricting post-employment activities of former employees,[73] the Congress has entered the field with specific guidelines. The Ethics in Government Act of 1978[74] amended existing post-employment legislation and imposed additional proscriptions.[75] Post-employment-restricting statutes and regulations attempt to reduce the negative effects of the ''revolving door'' practice, *e.g.*, to discourage a person from tailoring her/his official conduct while in office in order to enhance future employability in the private sector; to eliminate possible unfair influence with the former agency; and to deter improper use of confidential information.[76] As the Administrative Conference of the United States recently adopted a recommendation relating to post-employment restrictions,[77] this limitation to the general admission policy of the Agency Practice Act will not be considered further.

The remaining limitation (*i.e.*, authority to require a power of attorney as a condition to a monetary settlement) included by the Congress to the Agency Practice Act's admission requirement has, as enacted, apparently not been controversial; however, the limitation may not be broad enough to take into account a situation that a number of agencies face—release of information which is restricted by statute.[78]

---

[69] 5 U.S.C. § 500(d)(2)–(4), § 500(e) (1976).

[70] *See* Discipline of Attorneys Practicing before Federal Agencies, notes 201 *et seq.*, *infra* and accompanying text.

[71] 35 U.S.C. § 31, 32, 33 (1976) relate to, respectively: regulations for agents and attorneys; suspension or exclusion from practice; and unauthorized representation as practitioner.

[72] Note, *Conflicts of Interest and the Former Government Attorney*, 65 Geo. L.J. 1025, 1026 (1977).

[73] *See, e.g.*, 16 C.F.R. § 1025.67 (CPSC); 46 C.F.R. § 502.32 (FMC); 20 C.F.R. § 501.11(b) (Labor); 42 C.F.R. 5357 (Postal Service) as well as 5 C.F.R. § 735 (Rules on Post Employment Conflict of Interest, issued by OPM).

[74] P.L. 95-521, § 501(a), 92 Stat. 1824, *codified as* 18 U.S.C. § 207 (Supp. IV 1980).

[75] For an explanation of the Act, consult materials cited in Appendix C: Selected Bibliography, Part 4, *infra; see also* Consumer Product Safety Act, § 4, 15 U.S.C. § 2053(g)(2) (1976).

[76] See Shapiro, *Post Employment Restrictions of Ohio Ethics Law*, 7 Ohio North. L. Rev. 913, 917–23 (1980). *See* note 187, *infra.*

[77] *See* Recommendation 79-7, Administrative Conference of the United States, *reprinted in* 1 CFR 305.79-7 (1982).

In 1982, a federal district court in *McDaniel v. Israel*[79] struck down a regulation of the Social Security Administration (SSA)[80] as being inconsistent with the Agency Practice Act. The SSA rule required submission to the Administration of a notice signed by the claimant that the attorney, in fact, represented the client prior to the SSA's recognizing the attorney's representation. *McDaniel* held the rule in conflict with the Act, specifically with regard to the provision quoted, *supra*,[81] and another subsection which provides: "When a participant in a matter before an agency is represented by an individual qualified under this section, a notice or other written communication required or permitted to be given the participant in the matter shall be given to the representative in addition to any other service specifically required by statute."[82] The Social Security Administration refused to send to the attorney in *McDaniel* notices and written communications until he submitted the signed appointment of representation. This, the court held, was improper.[83]

Federal agencies may be caught in a statutory conflict. Particular statutes require that authorization be obtained before restricted information is released[84] and, in fact, sanctions may be imposed for improper release.[85] On the other hand, the Agency Practice Act, as interpreted by *McDaniel*, might appear to forbid an agency to require an attorney to submit a signed, appointment of representation, the effect of which would be to permit restricted information about the client to be provided to the attorney without a further release. The *McDaniel* opinion does not hold, however, that an agency may not require a power of attorney from a client prior to release of restricted information, only that such a release may not be made an admission to practice requirement before an agency. Presumably, an agency is permitted, after an attorney has filed "with the agency a written declaration that he is currently qualified" (*i.e.*, a member in good standing of the bar of the highest court of a State[86]), to require the attorney to submit a power of attorney signed by the client prior to releasing information which is restricted by statute. This would involve a two-step process, rather than the one-step procedure invalidated by the *McDaniel* court. Without addressing the reasoning of *McDaniel*, one can argue that even if the court is correct in its statutory interpretation, a two-step process is unnecessary and is only a bureaucratic burden. As a consequence, the Agency Practice Act should be amended to permit an agency to require a power of attorney from the client authorizing release of information which is restricted by statute as a condition of recognizing an attorney's representation.[87]

---

[78] *See* notes 84 and 85, *infra*.

[79] 53 Ad.L.2d 521 (W.D. Va. 1982).

[80] *See* 20 C.F.R. § 404.1707 (1982).

[81] *See* note 68, *supra* and accompanying text.

[82] 5 U.S.C. § 500(f) (1976). Although protection of confidential, personal information was recognized in *McDaniel* to be of concern, the court held that "the public is already adequately protected . . . by 18 U.S.C. § 1007. . . . Congress has established the procedures by which an attorney may qualify to represent a claimant . . . [and] this is all that is necessary and appropriate." 53 Ad.L.2d at 525.

[83] 53 Ad.L.2d at 524–25.

[84] *See, e.g.*, 26 U.S.C. § 6103(a) (1976) (Internal Revenue Service); 35 U.S.C. §§ 122, 181 (1976) (Patent and Trademark Office); 38 U.S.C. § 3305 (Supp. IV 1980) (Veterans Administration).

[85] *See, e.g.*, 18 U.S.C. § 1905 (Supp. IV 1980); 26 U.S.C. §§ 7213(a)(1), 7217 (Supp. IV 1980); 35 U.S.C. § 186 (1976); 38 U.S.C. § 3301(j) (Supp. IV 1980) (Incorporating penalty provisions of Privacy Act, 5 U.S.C. § 552a).

[86] 5 U.S.C. § 500(b) (1976).

In response to a survey sent to federal agencies (general counsels and chief administrative law judges[88]), over ninety-five percent of the twenty-four agencies responding to a question relating to admission requirements[89] did not favor admission requirements beyond those required by the Agency Practice Act, *i.e.*, the Act should not be amended to permit specialized requirements. One agency—the Postal Service—indicated, however, that an additional admission requirement was currently being imposed:

> Generally, except as provided in § 951.3, any attorney at law who is a member in good standing of the Bar of the Supreme Court of the United States or of the highest court of any State, District, Territory, Protectorate or Possession of the United States, or of the District of Columbia, and *is not under any order of any court or executive department of one of the foregoing governmental entities suspending, enjoining, restraining, disbarring, or otherwise restricting him in the practice of law* may represent others before the U.S. Postal Service.[90] (Emphasis added.)

---

[87] 5 U.S.C. § 500(d) should be amended to read: "This section does not—****prevent an agency from requiring a power of attorney as a condition to the release of information the disclosure of which is restricted by law.*" *See* note 235, *infra*. A similar recommendation was made in Weckstein, Control of Practice and Discipline of Representatives before Federal Administrative Agencies—A Study for the Administrative Conference of the United States 41 (Preliminary Draft/October 1970). See *Id.* at 34–42, for a discussion of powers of appointment as required by agencies in 1970, as well as the legislative history of 5 U.S.C. § 500(d)(4).

[88] *See* note 16, *supra*, and Appendix A (Federal Questionnaire).

[89] Twenty-seven agencies responded to the Federal Questionnaire; in some instances a response was received both from the general counsel and from the chief administrative law judge (or their representative) and in other instances only one or the other responded. The responding agencies were: The Department of Health and Human Services; Department of State; Postal Rate Commission; Department of Interior; U.S. International Trade Commission; Department of Commerce; NLRB; HUD; Federal Reserve System; Department of Transportation; FMC; Merit Systems Protection Board; USDA; CFTC; FCC; Department of Treasury; U.S. Coast Guard; SEC; FERC; CAB; ICC; FTC; Drug Enforcement Administration; FDA; U.S. Postal Service; National Transportation Safety Board; and Occupational Safety & Health Review Commission. Of the twenty-seven responding agencies, only twenty-four responded to QUESTION ONE, relating to admission requirements. Two agencies did state parenthetically that if additional requirements were to be imposed, the requirement would relate to competence (QUESTION TWO).

[90] 39 C.F.R. §951.2(c) (1982).

Section 951.3 provides:

> *Persons ineligible for admission to practice.*
>
> (a) *No person disbarred from practice before the Postal Service or in any other executive department of any of the governmental entities mentioned in § 951.2(c)* [set out, *supra*] *will be eligible to practice before the Postal Service until said order of disbarment shall have been revoked.*
>
> (b) Any person who, subsequently to being admitted to practice before the Postal Service, *is disbarred by any governmental entity mentioned in § 951.2(c) shall be deemed suspended from practice before the Postal Service during the pendency of said order or disbarment.*[91] (Emphasis added.)

These sections of "Procedures Governing the Eligibility of Persons to Practice before the Postal Service"[92] raise several issues. First, has the Postal Service imposed an additional admission requirement by denying eligibility to practice to an attorney who is under a disciplinary order issued by a court (or by an executive agency)? Second, may an agency deny, *ipso facto*, eligibility to practice on the basis of another authority's (*i.e.*, the licensing state's or an executive agency's) disciplinary order without an independent determination?

With regard to denying eligibility to practice because of discipline imposed by another agency (whether executive or independent), no authority appears to be included in the Agency Practice Act to support this proscription of the Postal Service regulation. As a consequence, ineligibility based on a disciplinary order of another agency would appear to violate 5 U.S.C. § 500.[93]

---

[91] 39 C.F.R. §951.3(a) & (b) (1982).

[92] 39 C.F.R. §951 (1982).

[93] One can argue that at least two parts of SEC Rule 2(e) [17 C.F.R. § 201.2(e) (1982)] violate 5 U.S.C. § 500 as "indirect" admission requirements. The Rule permits the Commission to impose discipline if an attorney does not "possess the requisite qualifications to represent others" or is "lacking in character or integrity." 17 C.F.R. § 201.2(e)(1)(i), (ii). *See* note 119, *infra* for text of Rule 2(e). The issue is, of course, do these standards permit the SEC to define competence and moral qualifications and, if an attorney is found lacking in either, to restrict her/his eligibility to practice before the Commission? If the response is in the affirmative, in the broader sense of independently defining these concepts rather than depending on the professional standards of the licensing state to define competence and moral character (and to give content to them by either denying a license or by restricting a license by a state disciplinary proceeding), these parts of Rule 2(e) would seem to violate § 500(b)—qualification to practice before federal agencies based solely on admission to a state bar. The legislative history of the Agency Practice Act is quite clear that the Congress intended to eliminate specialized bars before federal agencies and that matters of competence and moral character were for state determination, except for the Patent and Trademark Office. *See* 1965 U.S. Code Cong. & Ad. News 4170–80; Senate Comm. on the Judiciary, Abolishing Admission Requirements for Licensed Attorneys before Federal Administrative Agencies, S. Rep. No. 755, 89th Cong., 1st Sess. 1–7 (1965). If an agency can discipline a person because (s)he does not "possess the requisite qualification" or because (s)he is "lacking in character or integrity," is this not an indirect way of saying, "You must meet *our* standards of competence and moral qualification or we shall remove by a disciplinary proceeding your eligibility to practice before us."? That this is a reasonable interpretation of Rule 2(e) is reinforced by the next part of Rule 2(e)(1)(ii) which gives as an alternative basis for discipline that the attorney has "engaged in unethical or improper professional conduct." Competence and moral qualification are, therefore, being treated internally within Rule 2(e) as matters alternative to, and separate from, "unethical or improper

An exchange of correspondence between Michael Franck, Chair of the ABA Standing Committee on Professional Discipline and Howard C. Anderson, Chair of the Administrative Law Committee, ABA Section on Public Utility Law is instructive on the effect that may be given to a disciplinary action of the licensing state(s)—

Mr. Anderson on May 17, 1982:

> There is an additional point which should be considered in connection with the discussion. . . .
>
> As you know . . . a member [currently] in good standing of the bar of the highest court of a state may represent a person before an agency. . . .
>
> I understand that a state court can disbar, suspend or otherwise discipline a lawyer for conduct elsewhere, including conduct before a federal agency. For example,. . . . [A] lawyer might be disbarred [in Texas for misconduct before the Department of Interior]. The attorney, having lost his membership in the bar of Texas, will have lost his right to practice before the Department of Interior and other federal agencies.
>
> If this example does not bring out all the relevant points, others can be put forward.[94]

Mr. Franck on May 19, 1982:

> I have your further letter of May 17, 1982. You therein draw a conclusion the validity of which is subject to some doubt.
>
> It is not at all clear that because the right of a practitioner to practice before a federal administrative agency is originally dependent upon his admission to practice before the highest court of the state that if that state later revokes that practitioner's license to practice in the state he therefore automatically loses his right to continue to participate in matters pending before the agency. . . .
>
> I know of no clear statement of authority which holds that the revocation of the state license automatically revokes the right to continue to practice before an agency. Those who believe it does rely upon the logic of that conclusion.
>
> But the very same logic applies to admission to practice before the federal courts which is also dependent upon admission to practice before the highest court of a state. One would assume with equal logic that revocation of the state license upon which federal admission is predicated would automatically result in the revocation of the federal admission. But the Supreme Court of the United States has held to the contrary, *Selling v. Radford*, 243 U.S. 46 (1917) and *Theard v. United States*, 354 U.S. 278 (1957). Thus, a practitioner who has been disbarred by a state court might well argue that

---

professional conduct,'' the former being standards withdrawn by the Congress in the Agency Practice Act in 1965 as admission requirements, except for the Patent and Trademark Office. Whether federal agencies have authority under the Agency Practice Act to adopt standards relating to ''unethical or improper conduct'' is discussed at notes 118 *et seq.*, *infra* and accompanying text.

[94] Letter to Michael Franck from Howard C. Anderson (May 17, 1982), a copy of which is on file with the Administrative Conference of the United States.

> once he has qualified for agency practice he is entitled to a federal forum in which to have the matter of his continued qualification determined rather than have the federal forum "blindly" adhere to a state determination. . . .
>
> Finally, whatever the ultimate outcome of the foregoing issue as to the effect of the state court disbarment upon the right to practice before federal agencies insofar as practitioners who are admitted to practice in only a single state is concerned, it is clear that those federal agency practitioners who are admitted to practice in more than one state (an ever increasing number) could continue to practice before federal agencies at least until and unless they were disbarred in every state in which they were admitted.[95]

Mr. Anderson on May 28, 1982:

> I have your letter dated May 19, 1982. . . . [Mr. Anderson quoted 5 U.S.C. § 500(b),[96] emphasizing that an attorney must declare *current* good standing in the bar of the licensing State].
>
> If an individual is a member in good standing of the bar of the highest court of more than one state, then this qualification in either state will be sufficient under the statute to entitle him to represent a person before an agency. If he ceases to be so qualified in one state, but remains qualified in the other state, the latter qualification will suffice.
>
> You agree, as I understand it, that an individual admitted to practice in the courts of the state may be disbarred, by that State, because of conduct in a proceeding before a federal agency. That state disbarment would mean that he would not be entitled to make the representation (required by 5 U.S.C. § 500) that he is "currently qualified" as provided in that section. If that individual were also admitted to practice in a second state, it is of course possible that the second state would also take action, but if it did not the lawyer would remain qualified by virtue of the language in 5 U.S.C. § 500.
>
> Of course, your committee [*i.e.*, the ABA Standing Committee on Professional Discipline] may propose a change in 5 U.S.C. § 500 but it is not clear to me that you have indicated any desire to do so. So far as I know, § 500 has worked well, and if the individual is disbarred in the state in which he is admitted to practice (or in every state in which he is admitted to practice) why should not that terminate his statutory right to practice before federal agencies? Why should it make any difference that the bad conduct for which he was disbarred was conduct before a federal agency?
>
> The situation respecting practice before the federal courts (which you discuss in your letter) is quite different. In *Theard v. United States*, 354 U.S. 278, Justice Frankfurter pointed out (page 281) that the rules of court provide that when a member of the court's bar has been suspended in any state, then he has forty days to show cause why he should not be disbarred from the federal court. That seems clear, and it was applied in that case.

---

[95] Letter to Howard C. Anderson from Michael Franck (May 19, 1982), a copy of which is on file with the Administrative Conference of the United States.

[96] *See* note 68, *supra*, and accompanying text.

> We have to recognize that 5 U.S.C. § 500 is quite different, unless and until you ask Congress to change it.[97]

Mr. Franck on June 2, 1982:

> I have your further letter of May 28, 1982.
>
> There are a number of problems with placing reliance upon the provisions of 5 U.S.C. § 500 to revoke the right of lawyers to practice before administrative agencies. You have identified one, the individual who is admitted to practice in more than one state. How can one defend a provision which leads to the possible result that a lawyer licensed to practice in three states who is disbarred for misconduct before a federal agency by two of them, must continue to be permitted to practice before that very agency because the third state in which he is licensed has taken no action? . . .
>
> I agree that the decision in *Theard v. United States* is not dispositive. But, on the other hand, it is not accurate to suggest that the determination of that case depended upon the particular disciplinary rule in force in the lower federal court in which the proceeding was initiated. To the contrary, the court in substance concluded that a rule giving the federal court the discretion to evaluate the state court disbarment was required. The case stands clearly for the proposition that the federal courts may not under any circumstances undertake to automatically disbar a member of their bar simply on the basis of that lawyer's disbarment by a state court, even if that state court is the one upon which the lawyer's admission to the federal court was predicated. See also *Selling v. Radford*, 243 U.S. 46.[98]

Mr. Anderson on June 4, 1982:

> Thank you for your letter of June 2, 1982. . . . [Mr. Anderson quoted the question ending the penultimate paragraph, directly above: "How can one defend . . . no action?] With all respect, I suggest that this is a straw man. If the hypothetical lawyer admitted in three states is disbarred in two states, it is very likely that he will be disbarred also in the third state. . . .
>
> Regarding *Theard v. U.S.*, 354 U.S. 278, I believe the holding in the case was correctly stated in my letter of May 28. The court applied the rule of court which was clear and covered that case, just as it would apply 5 U.S.C. § 500 in a case involving a federal agency (unless you persuade Congress to change it).[99]

And finally, Mr. Franck on June 7, 1982:

> I have your further letter of June 4, 1982. At the risk of appearing to insist that I have the last word, I feel a reply is necessary.
>
> I am afraid that in evaluating the adequacy of existing provisions it is necessary to look at the world the way it is and not the way it ought to be.

---

[97] Letter to Michael Franck from Howard C. Anderson (May 28, 1982), a copy of which is on file with the Administrative Conference of the United States.

[98] Letter to Howard C. Anderson from Michael Franck (June 2, 1982), a copy of which is on file with the Administrative Conference of the United States.

[99] Letter to Michael Franck from Howard C. Anderson (June 4, 1982), a copy of which is on file with the Administrative Conference of the United States.

> The fact is that all too often lawyers admitted in more than one state and disbarred in one of them are not disciplined in the other.[100]

The Anderson/Franck exchange of correspondence demonstrates the interrelation of the issues relating to the effect that may be given by a federal agency to a disciplinary action of the licensing state(s). Noteworthy is that Messrs. Anderson and Franck agree, at least in theory,[101] on the first point, *i.e.*, if a person has been admitted to the practice of law in more than one state, that person is qualified to practice before federal agencies under the Agency Practice Act (5 U.S.C. § 500), notwithstanding discipline by one state, provided (s)he remains qualified to practice in at least one licensing state. If they are correct, and such appears to be the case, Postal Service regulation § 951.2(c) would violate the Act under the particular set of circumstances where an attorney retains a license to practice in one state, although having been disciplined in another jurisdiction.

Although a violation may exist, one tends to agree with Mr. Franck's June 2, 1982, observation: "How can one defend a provision which leads to the possible result that a lawyer licensed to practice in three states who is disbarred for misconduct before a federal agency by two of them, must continue to be permitted to practice before the very agency because the third state in which he is licensed has taken no action?" This is a situation which was apparently not considered by the Congress in 1965 when the Agency Practice Act was enacted and is one which should be eliminated by amendment of the Act.[102]

---

[100] Letter to Howard C. Anderson from Michael Franck (June 7, 1982), a copy of which is on file with the Administrative Conference of the United States.

[101] In the exchange of correspondence, Mr. Anderson believes this type of situation unlikely to occur (*see* note 99, *supra*, and accompanying text) while Mr. Franck states that it happens "not infrequently," (*see* note 100, *supra*, and accompanying text). On balance, Mr. Franck's experience with disciplinary matters [*i.e.*, as Executive Director of the Michigan Bar Association (a position he holds at present) and as Reporter for the Clark Committee (1970) (*see* note 24, *supra*)] would seem to suggest that his appraisal of the current situation may be more accurate.

[102] 5 U.S.C. § 500(b) should be amended to read: "An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts. *Notwithstanding, an agency which receives notice that a State license by virtue of which an individual is (or could have been) qualified under this subsection to represent persons before the agency has been suspended, enjoined, restrained, revoked, or otherwise restricted by the State, may require the individual to show cause within forty days why he should not be similarly suspended, enjoined, restrained, disbarred, or otherwise restricted in representing persons before the agency; the agency may suspend temporarily the right of the individual to represent persons before the agency unless and until he shall show cause.*" The indefinite article "a," rather than the definite article "the," has been used as the eighth word of the proposed amendment so that if an individual is licensed in more than one State, an agency may require the individual to "show cause," even though her/his right to practice has not been affected in all licensing States. A similar recommendation was made by Thomas Lumbard, a Washington, D.C., practitioner in his "Proposed Amendments to Title 5, United States Code, Section 500." *See* Letter to Jeffrey S. Lubbers from Thomas Lumbard (Mar. 25, 1982), a copy of which is on file with the Administrative Conference of the United States. *See also* note 112, *infra*.

Postal Service Regulation 951 raises another question: May discipline by a licensing authority or an executive agency (and for purposes of analysis, also by an independent agency) affect *ipso facto* the eligibility of a person to practice before the Postal Service? That is, do *Theard*[103] and *Selling*[104] (and other cases[105]) require an agency to make its own evaluation? Messrs. Anderson and Franck were unable to reach agreement on this issue. The answer with regard to discipline imposed by another agency, whether independent or executive, would seem clear: One agency, under the Agency Practice Act as currently enacted, may not deny eligibility to practice, whether *ipso facto* or otherwise, because of discipline taken by (or misconduct before[106]) another agency. The Act provides for one admission requirement: current good standing to practice before the highest court of a state.[107]

Even though Mr. Anderson is correct in his interpretation of the precedents (*i.e.*, exclusion under *court* rules permitting an attorney to show cause why (s)he should not be disbarred[108]) and, thus, *Theard* and *Selling* are not directly on point, one should not ignore the clear implications of the cases, especially the language of *Theard*:

> While a lawyer is admitted into a federal court [*or to practice before an administrative agency*] by way of a state court, he is not automatically sent out of the federal court by the same route. The two judicial systems of courts, the state judiciaries and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. . . . Disbarment being the very serious business that it is, ample opportunity must be afforded to show cause why an accused practitioner should not be disbarred. . . . The recognition that must be accorded such a state judgment [of disbarment] and the extent of the responsibility that remains in the federal judiciary were authoritatively expounded in *Selling*.[109]

---

[103] Theard v. United States 254 U.S. 278 (1957).

[104] Selling v. Radford, 243 U.S. 46 (1917).

[105] *See, e.g., In re* Ruffalo, 390 U.S. 544 (1968); Bogart v. Carter, 445 F.2d 321 (9th Cir. 1971).

[106] Although 5 U.S.C. § 500 does not "authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency," no indication has been found which indicates this provision was intended to apply to misconduct before another agency. *Id.* at § 500(d)(2).

[107] 5 U.S.C. § 500(b) (1976).

[108] *See*, Theard v. United States, 354 U.S. 278, 281 (1957); Selling v. Radford, 243 U.S. 46, 51 (1917).

[109] Theard v. United States, 354 U.S. 278, 281–282 (1957). Under the *Selling* standard, a state judgment must stand unless one or more of the following conditions appear from the state record:

> 1. That the state procedure, from want of notice or opportunity to be heard, was wanting in due process;
>
> 2. [T]hat there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not, consistently with our duty, accept as final the conclusion on that subject; or

In 1971, the Court of Appeals for the Ninth Circuit extended the *Theard/Selling* standard to administrative agencies when an agency considers the effect to be given to the discipline imposed by an attorney's licensing state.[110] Five years later, the Attorney General of the United States reversed a rehearing of the case overturned by the Ninth Circuit in 1971:

> It is my view that the Ninth Circuit . . . implicitly asserted an inalienable obligation on the part of the [Immigration & Naturalization] Service [INS] to exercise an independent judgment in suspension proceedings similar to that required of federal courts. Thus the hearing required by that decision was not a hearing simply to determine whether respondent has been suspended, but a hearing in which respondent might seek to discredit the state finding for lack of minimum procedural fairness in the underlying process, or for absence of minimally sufficient evidentiary support, and in which respondent might adduce some other ''grave reason'' which should prevent the natural consequences of the state judgment from extending into the federal sphere.
>
> The Board argues it is bound by [its regulation] which states that the board may suspend an attorney if such suspension is in the public interest and that, if an attorney has been suspended by a state court, his suspension from the bar of the board ''shall be deemed to be in the public interest.'' Obviously, however, *Departmental regulations cannot contravene judicially established requirements of fairness. . . . The standard for suspension from practice before the board and the Service . . . is the same as that for disbarment before the federal courts.*[111] (Emphasis added.)

Of course, one court of appeals' decisions (and the opinion of the Attorney General) do not by themselves provide authoritative interpretation of the Agency Practice Act on this point; however, the strong implication contained in *Theard* and *Selling* adds strength to the argument that an agency is to provide a ''show-cause'' hearing before imposing a restriction on the eligibility to practice before the agency based on discipline by the licensing state. To clarify this point, the Agency Practice Act should be amended to provide for a ''show-cause'' hearing before an agency restricts the right to practice because of discipline imposed by the licensing state.[112]

> 3. [T]hat some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained to do so.

Selling v. Radford, 243 U.S. 46, 51 (1917).

[110] Bogart v. Carter, 445 F.2d 321 (9th Cir. 1971).

[111] In re Peter D. Bogart, 38 Ad.L.2d 124, 128–29 (1976). The Attorney General did bolster his conclusion by reference to INS procedures permitting 30 days to respond to charges and to discretionary language in the INS regulation. 38 Ad.L.2d at 128.

[112] If the Agency Practice Act were to be amended to permit reciprocity not only for state imposed discipline, but also for that imposed by federal courts and other federal agencies, the language suggested for 5 U.S.C. § 500(b) [note 102, *supra*] would be expanded to read: ''An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf

In the early draft of the ABA Standing Committee on Professional Discipline's proposed ''Rules for Federal Agency Discipline,''[113] a centralized register of attorneys was suggested because ''[a]n efficient system requires the development and maintainence [sic] of a roster of the name, address, and birthdate of all practitioners, the agencies before which they are admitted to practice, and the jurisdictions in which they are licensed, in order to assist . . . in the proper identification of practitioners who allegedly have engaged in professional midconduct.''[114] Opposition to the register apparently induced the Standing Committee to delete the concept of a centralized register from subsequent drafts, as well as from the final proposed rules presented to the ABA House of Delegates on August 11, 1982, at the Association's Annual Convention.[115] The register was viewed by its critics as ''burdensome''; ''creating great repositories of files''; and inherently incomplete because of the impossibility of constructing a comprehensive listing since: (1) some ''agencies do not enroll a practitioner but instead provide that an attorney qualified to practice in any state . . . is automatically authorized to practice before that agency'' and (2) a ''lawyer in the hinterlands who never physically appears in agency premises in person or by paper, but who advises a client about a statute or rule administered by an agency'' would not be listed.[116] In other words, as an official of the Treasury Department observed, ''The proposal to maintain a roster of all practitioners . . . would be a horrendous undertaking, since it would mean listing all lawyers . . . in the U.S.''[117]

When one first considers regulation of attorneys practicing before federal agencies, a logical requirement seems to be creation and maintenance of a register, roster, or the like of attorneys practicing administrative law; however, on closer reflection, one is led to the conclusion that this is an idea whose day has not, and probably never will, come. The expense involved, as well as little expectation of producing anywhere near a complete listing, makes the creation

---

he acts. *Notwithstanding, an agency which receives notice that a State license by virtue of which an individual is (or could have been) qualified under this subsection to represent persons before the agency (or that such an individual's qualification to represent persons before a federal court or before another agency) has been suspended, enjoined, restrained, revoked, or otherwise restricted by the State, federal court, or other agency may require the individual to show cause within forty days why he should not be similarly suspended, enjoined, restrained, disbarred, or otherwise restricted in representing persons before the agency; the agency may suspend temporarily the right of the individual to represent persons before the agency unless and until he shall show cause.*'' For further discussion of reciprocity of agency discipline, *see* notes 231 to 234, *infra* and accompanying text.

[113] *See* Franck Proposal, *supra* note 7.

[114] *See* Draft Model Mechanism, dated March 19, 1981, page 9 (Commentary to Rule 5), a copy of which is on file with the Administrative Conference of the United States.

[115] *See* Franck Proposal, *supra* note 7.

[116] The sources of the quotations are not considered important, but their cumulative effect, as well as others, appears to have had its effect—the register, as a concept, was deleted. Copies of the quoted correspondence are on file with the Administrative Conference of the United States.

[117] Letter to Michael Franck from David R. Brennan (April 16, 1981), a copy of which is on file with the Administrative Conference of the United States.

of a centralized listing of attorneys practicing in the federal administrative process highly unlikely.

If attorneys authorized to practice before agencies under the requirements set by the Congress (*i.e.*, the Agency Practice Act) are to be regulated, two additional aspects are applicable: To what standards of conduct are attorneys to be held? And, what mechanism will be employed for violation of the applicable standards of conduct? These will be considered in order.

Standards for Regulation of Conduct of Attorneys Practicing before Federal Agencies

On February 28, 1981, the Securities and Exchange Commission (SEC) announced in *In the Matter of Carter and Johnson*[118] an interpretation of SEC Practice Rule 2(e):[119]

> [A] lawyer engages in "unethical or improper professional conduct" under the following circumstances: When a lawyer with significant responsibilities in the effectuation of a company's compliance with the disclosure requirements of the federal securities laws becomes aware that his client is engaged in a substantial and continuing failure to satisfy those disclosure requirements, his continued participation violates professional standards unless he takes prompt steps to end the client's noncompliance. The Commission has determined that this interpretation will be applicable only to conduct occurring after the date of this opinion.[120]

The SEC explained that an attorney who finds her/himself in such a situation is to counsel accurate disclosure but if that advice is not followed and the security laws continue to be violated, (s)he must take "further, more affirmative steps": *e.g.*, resignation, a direct approach to the board of directors, or enlistment of aid from other members of the management.[121] In sum, what is required is "some prompt action that leads to the conclusion that the lawyer is engaged in efforts to correct the underlying problem, rather than having capitulated to the desires of a strong-willed, but misguided client.''[122]

---

[118] In the Matter of Carter and Johnson [SEC Release No. 34-17597, Feb. 28, 1981], Fed. Sec. L. Rep. (CCH), No. 903 (Special Edition) (March 6, 1981) [hereinafter referred to as *Carter and Johnson*].

[119] Rule 2(e), 17 C.F.R. 201.2(e) (1978), provides in paragraph (1):

> The Commission may deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice of and opportunity for hearing in the matter (i) not to possess the requisite qualifications to represent others, or (ii) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct, or (iii) to have willfully violated, or willfully aided and abetted the violation of any provision of the federal securities laws (15 U.S.C. 77a to 80b-20), or the rules and regulations thereunder.

See note 93, *supra*.

[120] *Carter and Johnson*, *supra* note 118, at 79, 80. The promulgating of new policy in an adjudication without applying the policy in the adjudication would appear to be a "prospective order," similar in nature to the "Excelsior Rule" invalidated in N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759 (1969); cf. Ford Motor Co. v. FTC, 654 F.2d 599 (9th Cir. 1981). *See* note 123, *infra*.

[121] *Carter and Johnson*, *supra* note 118, at 80, 81.

Six months later, the Commissioners requested comments on the appropriateness of the announced interpretation, specifically stating that comments with regard to the ''authority to adopt and administer Rule 2(e)'' were not being solicited.[123] The attempt to limit public input to the *Carter and Johnson* interpretation of Rule 2(e) was not successful. Many of the comments received by the SEC directly challenged not only the standard (on which comments were requested), but also the authority of the Commission to establish *any* standards similar to canons of ethics or a code of professional responsibility.[124]

The Commissioners' request for comments on the *Carter and Johnson* standard provided a vehicle for associations of attorneys and individual practitioners to express their concern not only about agency standards of conduct in general, but also about an emerging type of practice standard—one whose purpose appears to be enlistment of attorneys to assist in carrying out an agency's substantive law responsibilities. In 1973, the SEC clearly stated an intention to enlist attorneys, a purpose which was reaffirmed in 1981 in *Carter and Johnson*:

> We have previously noted ''the pecularly (sic) strategic and especially central place of the private practicing lawyer in the investment process and

---

[122] *Id.* at 81.

[123] SEC release No. 34-18106, September 21, 1981, *reprinted in* 23 SEC Docket 8261826 (Oct. 6, 1981). The SEC's request for comments would not seem to cure the ''prospective order'' nature of the interpretation [*see* note 120, *supra*], as the policy interpretation of Rule 2(e) is not being repromulgated, but remains ''in effect'' subject to change:

> After careful consideration of these comments, the Commission will issue a further release summarizing and analyzing the comments received. *Based upon the comments, it may or may not determine to expand or modify its interpretation*. Until that time, *the present interpretation will govern all similar circumstances* for purposes of proceedings pursuant to Rule 2(e) if the conduct occurred after February 28, 1981. (Emphasis added.)

23 SEC Docket at 8261827.

[124] *See* 68 ABAJ 252 (1982) for a brief summary of a number of comments. The entire file of comments is available for public inspection (under File No. 57-905) at the Commission's Public Reference Section, Room 6101, 1100 L Street, N.W., Washington, D.C. The September 21, 1981, twenty-one page Response of the ABA Section of Corporation, Banking and Business Law (whose position was adopted by the ABA Board of Governors as policy of the Association) is representative of the comments received by the Commission:

> The Proposal appears to reflect the Commission's belief that, notwithstanding the absence of any authority for the Commission to establish a ''federal securities bar,'' the Commission somehow possesses and should exercise authority, analogous to that possessed by state bar authorities and state courts, to promulgate the equivalent of canons of ethics or a code of professional responsibility. The current proposal is, of course, concerned with but one aspect of the relationship between lawyers and with their corporate securities clients. We find nothing in the Release, however, that acknowledges any limitation on the Commission's belief concerning its power to set standards of conduct for lawyers acting as lawyers. . . . In our view the Proposal to transform the Commission into a promulgator of ethical norms for the legal profession is a novel and disturbing one.

Id. at 2, 3. A copy of the Response is on file with the Administrative Conference of the United States.

in the enforcement of the body of federal law aimed at keeping that process fair. . . . [T]he task of enforcing the securities laws rests in overwhelming measure on the bar's shoulders.''[125]

In addition to the SEC, at least one other agency has proposed a similar role for attorneys. In late 1979, the Internal Revenue Service (IRS) began considering (and in 1980 proposed) new rules which would have prohibited an attorney from issuing a tax shelter opinion unless (s)he concludes that it is ''more likely than not that the bulk of the tax benefits on the basis of which the shelter has been promoted are allowable under the tax law.''[126] A breach of this standard would have constituted grounds for disbarment before IRS, without regard to the wilfulness of the violation.[127] One commentator observed about the tax-shelter proposal, ''Just as the debate over the SEC's Rule 2(e) program begins to boil and bubble, creating toil and trouble for more and more securities attorneys, [the IRS] is suggesting improper conduct in tax counseling could be grounds for discipline by the Treasury Department.''[128] The increased interest by federal agencies (not only by the SEC and the IRS, but by others[129]) in promulgating standards of conduct to regulate attorneys, was the primary factor in generating the proposals relating to discipline of attorneys practicing before federal agencies considered by the ABA House of Delegates on August 11, 1982.[130]

---

[125] *Carter and Johnson*, *supra* note 118, at 12 n. 21 quoting In the Matter of Emanuel Fields, 45 SEC 262, 266 n. 20 (1973), *aff'd without opinion*, 495 F.2d 1085 (D.C. Cir. 1974). The SEC in *Fields* continued the thought quoted in the text, making the intent of the Commission even clearer: ''These were statements of what all who are versed in the practicalities of securities law know to be a truism, *i.e.*, that this Commission with its small staff, limited resources, and onerous tasks is peculiarly dependent on the probity and the diligence of the professionals who practice before it.'' 45 SEC at 266 n. 20. This sentence was not quoted in *Carter and Johnson*. *But cf.* dissent of SEC Commissioner Karmel in Keating, Muething & Klekamp, 45 Ad.L.2d 1072, 1083 (1979):

> In my opinion, rule 2(e) is an invalid exercise of the Commission's authority. I recognize that I am not writing on a clean slate, but until the question of the Commission's authority to discipline attorneys is validated by the United States Supreme Court or the Congress, I believe the validity of Rule 2(e) will not be free from doubt. I also recognize that the Commission has brought numerous 2(e) proceedings against attorneys, and that unless the courts or Congress abrogate the rule, the Commission, unfortunately, is unlikely to rescind it. Accordingly, I advocate that the Commission at least confine proceedings against attorneys under Rule 2(e) to cases in which an attorney has improperly conducted himself while personally representing clients before the Commission. Further, the misconduct should thwart the Commission's ability to function or should obstruct administrative justice. In no case, I believe, should the Commission invoke an equivocal administrative remedy like Rule 2(e) to discipline attorneys for conduct which does not directly threaten its administrative processes. To do so, is tantamount to setting professional standards for the practice of law.

For a discussion of the SEC position on enlisting attorneys, *see* Pickholtz, *The Proposed Model Rules of Professional Conduct—and other Assaults Upon the Attorney-client*, 36 Bus. Law. 1841, 1848–51 (1981).

[126] *See* Tax Shelters, Practice Before the Internal Revenue Service, Proposed Treasury Regulation, 45 Fed. Reg. 58,594 (1980).

[127] For an explanation of the Tax-Shelter Rule proposed by the IRS, *see* Hester, *Are New Treasury Rules a Tax Device in Disguise?*, 3 Legal Times Washington, Sept. 19, 1980, at 12, Col. 1. *See also* citations in 68 ABJ 471 n. 2 (1982).

[128] Lempert, *IRS Mulls Attorney Shelter Crackdown*, 2 Legal Times Washington, Dec. 3, 1979, at 1, Col. 2.

Analysis of the authority of federal agencies to promulgate standards of conduct, as well as the extent and nature of attorney conduct which may be controlled by these standards, is central to understanding regulation of attorneys by federal agencies. Even if one concludes that an agency has authority to promulgate standards of conduct, the extent to which this power may be exercised in controlling the practice of law must be considered.

Without question, the most explicit authority to adopt practice standards and to discipline attorneys who violate the standards has been given to the Patent and Trademark Office:

> The Commission . . . may prescribe regulations governing the . . . conduct of attorneys[131]. . . . [and] may, after notice and opportunity for a hearing, suspend or exclude, either generally or in any particular case from further practice before the [Patent and Trademark Office] any . . . attorney . . . who does not comply with the regulations.[132]

And to the Treasury Department:

> The Secretary of Treasury may prescribe rules and regulations governing the recognition of . . . attorneys. . . . [and] may after due notice and

---

[129] *See, e.g.*, *NRC Will Discipline Lawyers Under Proposed Conduct Rules*, 2 Nat. L.J., Feb. 11, 1980, at 8, Col. 1; Moore, *FERC Criticizes Lawyers' Work*, 4 Legal Times Washington, Jan. 4, 1982, at 2, Col. 3.

[130] *See* notes 7 *et seq.*, *supra* and accompanying text. With regard to the significance placed on agency authority to adopt standards of practice, a further resolution dealing with standards was proposed for addition to the Waxman/Forrest Proposal, *supra* note 8:

> Further resolved, that the American Bar Association recognizes that important constitutional issues relating to the right to counsel and to due process are presented by legislation expressly conferring authority on federal agencies to adopt standards of practice governing, or to exercise disciplinary authority over, attorneys who represent clients subject to the procedures of and regulation by federal agencies and the exceptions for such express statutory authority contained in the foregoing resolution are not intended to express any conclusion by this Association on those important issues.

This additional resolution was proposed in order to "preclude any implication that the ABA, by adopting the alternative proposal [*i.e.*, Waxman/Forrest Proposal], endorses the efficacy of express statutory authorizations of federal agencies to adopt standards of practice. . . ." Letter to Antonin Scalia from W. Loeber Landau (July 16, 1982), forwarding the proposed "Resolved" for Waxman/Forrest Proposal *supra*, a copy of which is on file with the Administrative Conference of the United States. A clearer explanation of why the additional "Resolved" was suggested (as well as why the Waxman/Forrest Proposal note 8, *supra*, was amended on the floor of the House of Delegates before the Proposal was submitted for consideration; *see* note 203, *infra*) may be that a number of persons became concerned that the Waxman/Forrest Proposal as drafted and originally submitted to the House of Delegates, would permit the SEC simply to seek express authority from the Congress to adopt standards. *See, e.g.*, letter to Joseph A. DeGrandi from Stuart N. Senniger (July 19, 1982) which raises this concern; a copy of this letter is on file with the Administrative Conference of the United States.

[131] 35 U.S.C. § 31 (1976).

[132] 35 U.S.C. § 32 (1976).

> opportunity for hearing suspend, and disbar from further practice before his department any such . . . attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations.[133]

Except for the few agencies that have express authority to promulgate rules and discipline attorneys for their violation,[134] authority to promulgate standards (and to discipline) must be implied. One of the clearest expressions of judicial approval of implied authority to adopt standards of conduct and to discipline persons appearing before an agency was given by the Court of Appeals for the Second Circuit in 1979 in *Touche Ross & Co. v. SEC*:[135]

> Section 23(a)(1) of the 1934 Act, 15 U.S.C. § 78w(a)(1) (1976), authorizes the [Securities and Exchange] Commission to "make such rules and regulations as may be necessary or appropriate to implement the provisions of this title for which [it is] responsible or for the execution of the functions vested in [it] by this title. . . ." Pursuant to this general rulemaking authority, the Commission adopted and subsequently has amended Rule 2(e) of its Rules of Practice, 17 C.F.R. § 201.2(e) (1978). . . .
>
> The current Rule and its predecessors have been in effect for over forty years. It has been the basis for a number of disciplinary proceedings brought against professionals—including accountants and attorneys—during this forty year period. . . .
>
> Although the mere fact that the Rule is of long standing does not relieve us of our responsibility to determine its validity, . . ., it is noteworthy that no court has ever held that the Rule is invalid. . . .
>
> [W]e reject appellants' assertion that the Commission acted without authority in promulgating Rule 2(e). Although there is no express statutory provision authorizing the Commission to discipline professionals appearing before it, Rule 2(e), promulgated pursuant to its statutory rulemaking authority, represents an attempt by the Commission to protect the integrity of its own processes. It provides the Commission with the means to ensure that those professionals, on whom the Commission relies heavily in the performance of its statutory duties, perform their tasks diligently and with a reasonable degree of competence. As such the Rule is "reasonably related" to the purposes of the securities laws. . . . Moreover, we hold that the Rule does not violate, nor is it inconsistent with, any other provision of the securities laws. *We therefore sustain the validity of the Rule as a necessary adjunct to the Commission's power to protect the integrity of its administrative procedures and the public in general.*[136] (Emphasis added.)

---

[133] 31 U.S.C. § 1026 (1976).

[134] At least one other agency has express authority from the Congress. On July 4, 1884, three days before the Treasury statute was enacted, the Secretary of the Interior was empowered, by language similar to that contained in 31 U.S.C. § 1026, to promulgate rules and to discipline attorneys. *See* 43 U.S.C. § 1464 (1976) (Public Lands).

[135] 609 F.2d 570 (2d Cir. 1979). Although *Touche Ross* sustained Rule 2(e) as applied to accountants, strong dictum suggests the court's rationale has equal application to the authority of the SEC to promulgate and apply Rule 2(e) to attorneys. *See* note 136, *infra* and accompanying text.

[136] 609 F.2d at 577–78, 582.

The court's bases for sustaining the implied authority of agencies to regulate the conduct of persons practicing before them are open to criticism. For example, how broad is the power to "protect the integrity of . . . administrative procedures and the public"? A critique of *Touche Ross* was made by SEC Commissioner Karmel in her dissent in *Keating Muething & Klekamp*,[137] in which a number of crucial issues are raised regarding the extent of the implied authority of agencies to promulgate standards of practice:

> In *Touche Ross & Co. et al. v. SEC*, the Second Circuit recently upheld the validity of Rule 2(e), as a general matter, as to accountants, and by the way of dictum as to attorneys, on the ground that it was "reasonably related" to the purposes of the securities laws. The Court viewed Rule 2(e) as an attempt by the Commission to protect the integrity of its own processes and to ensure that professionals practicing before the Commission perform their tasks diligently and with a reasonable degree of competence. I believe this rationale may justify the use of Rule 2(e) to discipline accountants,[138] although express statutory authority to this effect would, in my mind, be better government. However I do not believe this rationale is sufficient to justify the use of Rule 2(e), as presently drafted, as a general enforcement tool to discipline attorneys,. . . . The Commission, like any other government body, may have some need to have and to utilize a *disciplinary power against attorneys who practice before it in order to keep its proceedings orderly and dignified*. However, the lack of any demonstrated need for an enforcement mechanism generally to raise the competence of attorneys or

---

[137] 45 Ad. L. 2d 1072, 1077 (1979).

[138] Commissioner Karmel explained the express statutory differences between the SEC's authority to discipline attorneys and accountants and noted a bill before Congress which was pending when she wrote her dissent:

> In the case of accountants, Congress gave the Commission express statutory power in Section 19(a) and Schedule A of the Securities Act of 1933 [15 U.S.C. § 77s(a) and § 77aa (Schedule A)] to define accounting terms and to require that financial statements be certified by an independent public accountant. It therefore can be argued that the administrative disciplining of accountants is a necessary and appropriate adjunct to an express Commission mandate and responsibility. In the case of attorneys, however, there is no such direct substantive authority for the Commission to implement by way of an administrative remedy.[8]

[Footnote 8 reads:]

> In this regard, however, I note that there is presently pending in Congress legislation which contains a provision which could be construed to vest not only the Commission but any federal agency with effectively unlimited power to discipline attorneys. *See* Section 203(a) of S. 262, 96th Congress, providing in part:
>
> > [E]ach agency may prohibit any individual from operating before the agency or its responsible employees whenever such individual refuses to adhere to reasonable standards of orderly and ethical conduct *or* continues, despite agency requests to the contrary, to engage in the deliberate use of dilatory tactics . . . (emphasis added).
> >
> > Although enactment of this provision would solve the problems I have with the commission's statutory authority to promulgate Rule 2(e), I believe such a provision would be contrary to sound public policy for the reasons set forth in this opinion.

45 Ad. L. 2d at 1079. *See* note 1, *supra* for position of ABA on S.262. *See also* Daley & Karmel, *Attorneys' Responsibilites: Adversaries at the Bar of the SEC*, 24 Emory L.J. 747 (1975); Karmel, *Attorneys' Securities Laws Liabilities*, 27 Bus. Law. 1153 (1972).

> to protect investors is indicated by the history of Rule 2(e). . . . In my opinion, it is *improper* for an independent federal administrative agency *to impose sanctions which are not specified by Congress*. In addition, the potential corruption of justice when an administrative agency with significant prosecutorial responsibilities has the power to sanction an adversary representing and advising a client persuades me that the Commission should not exercise disciplinary power against attorneys.[139] (Emphasis added.)

Although other judicial decisions do sustain implied authority of agencies to regulate attorneys,[140] *Touche Ross* is the "current" precedent. Commissioner Karmel correctly points out that with respect to attorneys, *Touche Ross* is dictum, and that at least with regard to the SEC, a different statutory pattern exists with regard to attorneys and to accountants.[141] Although the *Touche Ross* language seems clear, dictum is just that, dictum—not precedent. Ms. Karmel also questions the extent, even if an agency has authority to promulgate standards, an agency may address conduct of an attorney beyond that required to keep its proceedings "orderly and dignified." She appears to be suggesting that a line should be drawn between standards which are directed at maintaining order in (and perhaps assuring the integrity of) a particular proceeding versus those that have as their focus the raising of attorney competence or enlisting attorneys to asssist in enforcing substantive law. Is this distinction valid? One can argue that the point is well taken.

Something strikes one as amiss when substantive law provisions (*e.g.*, obtaining disclosure in the securities area or policing tax shelters) must be enforced by ethical standards. If an attorney violates a requirement imposed by statute, (s)he should be called to task in the courts for the substantive violation.[142] The theoretical basis for objecting to the use of professional standards to compensate for deficiencies in substantive law (whether statutory or the administrative implementation) or for the inconvenience, expense, delay, or whatever of pursuing substantive violations in the judicial (or administrative) process is difficult to formulate. Simple responses such as ''It's not right.'' or ''It shouldn't be done.'' are not helpful. Dean John F. Sutton, Jr., however, has provided an insight for analysis, although his comments were made with reference to whether the Code of Professional Responsibility should be revised.[143] After explaining the division of the Code into Canons (''general concepts used as chapter headings''), Ethical Considerations (''aspirational in character''), and Disciplinary Rules (''mandatory regulatory rules''), he noted that Canons and Ethical Considerations were not intended to be binding or to be enforced, as has occasionally occurred, as regulatory rules or law. In addition, he continued, ''Disciplinary Rules have been misused as rules of procedure in substantive cases as rules of procedure to affect lawyer conduct, a role for which in some instances the Rules were ill-suited.''[144]

---

[139] 45 Ad. L. 2d at 1079–80, 181, 183.

[140] *See, e.g.*, note 46, *supra*.

[141] *See* note 138, *supra*.

[142] The SEC, in addition to responding to attorney misconduct by Rule 2(e) proceedings, also seeks injunctions against violation of the securities law by attorneys [*see, e.g.*, SEC v. Blatt, 583 F.2d 1325 (5th Cir. 1978); SEC v. Coven, 581 F.2d 1020 (2d Cir. 1978); SEC v. Universal Major Industries Corp., 546 F.2d 1044 (2d Cir. 1973); SEC v. National Student Marketing Corp., 457 F. Supp. 682 (D.D.C. 1978)] and attorneys are, on occasion, criminally prosecuted for securities violation [*see, e.g.*, United States v. Benjamin, 328 F. 2d 854 (2d Cir. 1964)]. Sometimes these alternatives come together as in *In re* Emanuel Fields, 33 Ad. L. 2d 439 (1973) which involved permanent disqualification under Rule 2(e) of an attorney who had been enjoined four times from violating various sections of the securities law. On occasion, the action taken by the SEC in a Rule 2(e) action is reversed; *see* Kivitz v. SEC, 475 F.2d 956 (D.C. Cir. 1973). Lastly, an attorney may be subject to a damage action by persons who have been injured by her/his misconduct. *See, e.g.*, Wachovia Bank and Trust Co., N.A. v. National Student Marketing Corp., 650 F.2d 342 (D.C. Cir. 1980); *cf.* Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1970) (Private cause of action against accountants). For application standards, *see* Fiflis, *Choice of Federal or State Law for Attorneys' Professional Responsibility in Securities Matters*, 56 N.Y.U.L. Rev. 1236 (1981).

A reasonable inference of Dean Sutton's remarks would seem to be almost self-evident: Guidelines to regulate the practice of law reflect a delicate balance between ''regulatory *laws*, standards of *recommended* normal *professional practices*, and *ethical* norms of *aspirations* and professional objectives.''[145] (Emphasis added.) In recommending a revision of the Code of Professional Responsibility, he urges that future disciplinary standards be ''realistic and susceptible of uniform, regular enforcement.''[146]

Even though a single, uniform statement of standards of professional responsibility for attorneys is not possible in the United States because of the myriad authorities which adopt standards for attorneys, the legal profession does have a a basic norm (although tailored by these authorities) to govern its conduct: The Code of Professional Responsibility or whatever successor statement is

---

[143] Sutton, *How Vulnerable is the Code of Professional Responsibility*, 57 N.C. L. Rev. 497 (1979). Professor Sutton was the Reporter for the ABA Special Committee on Evaluation of Ethical Standards (1965–1970), the Committee that drafted the Code of Professional Responsibility, and at present is Dean of the University of Texas School of Law.

[144] *Id.* at 514–516. *See also* Lindgren, *Toward a New Standard of Attorney Disqualification*, 1982 Am. B. Found. 421. In the Statement of the ABA Section of Corporation, Banking, and Business Law (July 3, 1979) in response to the SEC's request for comments on the administrative law judge's (ALJ) findings in *Carter and Johnson* (SEC Release 34-15724, Mar. 7, 1979), the distinction between Disciplinary Rules and Ethical Considerations was brought to the attention of the Commission. According to the Statement, the ALJ made no finding which supported a violation of Disciplinary Rules (p. 14), but rather much of the ALJ's discussion related to alleged violations of Ethical Considerations (p. 14–17). The Statement concluded by voicing its disagreement with the ALJ that an attorney is required ''as a matter of competence, professional responsibility or securities law compliance to bring disagreements with management as to legal matters to the attention of his clients' board of directors, at least in the absence of knowledge by the lawyer of a conflict between the interests of the corporation and those of the officers with whom he deals.'' (p. 17) A copy of the Statement is on file with the Administrative Conference of the United States.

Of interest is that in the Commission's opinion in *Carter and Johnson*, the SEC declined to make use of the Disciplinary Rules of the Code of Professional Responsibility (CPR) in evaluating the conduct of Messrs. Carter and Johnson, preferring instead to announce a new interpretation of Rule 2(e) which apparently is not grounded in the CPR. *See Carter and Johnson*, *supra* note 118, at 73 n. 65.

[145] 57 N.C. L. Rev. at 517.

[146] *Id.*

produced by the American Bar Association and adopted by the authorities. This norm reflects what a significant segment of the legal profession at a particular point in time believes to be the proper balance between, *e.g.*, regulatory laws, recommended professional practices, and ethical aspirations. To permit a federal agency to operate outside the general framework of the current thinking of the legal profession by imposing *ad hoc* substantive, regulatory laws would seem not only divisive, but also could place attorneys practicing before the agency in conflict with the mainstream of the legal profession with regard to professional responsibility or, even more serious, in violation of standards adopted by the attorneys' licensing authorities.[147]

In 1975, Justice Potter Stewart recognized that the role of a business lawyer in our society has yet to be resolved, and that only when her/his role was defined could a determination be made "what ethical judgments are best left in the public interest—not to a code of professional responsibility, but to individual conscience.''[148] Two years earlier, the Court—the majority as well as the dissenters—reaffirmed the special relationship between attorneys and the government. Justice Powell delivered the opinion of the Court in *In re Griffiths*[149] (which held exclusion of resident aliens from the practice of law unconstitutional):

---

[147] *See, e.g.*, Letter to author from John F. Sutton, Jr. (May 4, 1982), a copy of which is on file with the Administrative Conference of the United States:

> At the time the Wright Committee was preparing the Code of Professional Responsibility, the members of the Committee definitely thought the Code should apply to all conduct of all lawyers in all situations before all bodies. In other words, they intended for the disciplinary rules to constitute the regulatory law but realized, of course, that the disciplinary rules would be effective only when adopted by an authority having jurisdiction to discipline lawyers. In addition to the Supreme Court of each state, they thought, I believe, that the federal courts would use the rules in that fashion; and at least, I am sure that Justice Charles Whitaker so believed. At the same time, they felt it would be divisive and would probably present conflicting standards to lawyers if agencies (whether State or Federal) adopted separate disciplinary or regulatory law. On the other hand, obviously different agencies proceed in varying ways and professional norms might well differ when practicing before various kinds of courts and agencies. . . .
>
> My own belief is that agencies should not adopt separate administrative codes for conduct of lawyers but should seek to amend the Code or the Model Rules if a change is desirable.

See also Letter to author from Andrew L. Kaufman (May 24, 1982), a copy of which is on file with the Administrative Conference of the United States:

> My primary concern is that practicing lawyers not be subjected to conflicting standards of professional conduct. It is difficult enough for lawyers to figure out what their obligations to their clients and to society are without at the same time being subjected to multiple varying standards from different bodies that may have some authority over them. As the practice of law is currently organized, the codes of professional responsibility presently adopted in the various states represent the primary sources of lawyers' obligations. I understand the concerns that impel various state and federal agencies to consider the imposition of additional obligations. It may be that there are truly unique circumstances that might justify particular agencies in adopting rules to cover particular situations that are left uncovered by those codes. Most such proposals, however, while they may involve special situations, also involve the possiblity of concurrent application of the state law of professional responsibility, and I am fearful that any opening of the door to so-called "special situations" will result in the promulgation of many rules that will put lawyers who genuinely care about their professional duty in very difficult situations.

Professor Kaufman is the author of A. Kaufman, Problems in Professional Responsibility (1976).

> It has been stated many times that lawyers are ''officers of the court.'' One of the most frequently repeated statements to this effect appears in *Ex parte Garland*, 4 Wall. 333, 378. The Court pointed out there, however, that an attorney was not an ''officer'' within the ordinary meaning of that term. Certainly nothing that was said in *Ex parte Garland* or in any other case decided by this Court places attorneys in the same category as marshals, bailiffs, court clerks or judges. Unlike these officials a lawyer is engaged in a private profession, important though it be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business. The word ''officer'' as it has always been applied to lawyers conveys quite a different meaning from the word ''officer'' as applied to people serving as officers within the conventional meaning of that term. . . .
>
> Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts. Moreover, by virtue of their professional aptitudes and natural interests, lawyers have been leaders in government throughout the history of our country. Yet, *they are not officials of government by virtue of being lawyers. Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy.*[150] (Emphasis added.)

The two dissenters, especially Chief Justice Burger, agreed with the majority on this point:

> Whatever the erosion of the officer-of-the-court role, the overwhelming proportion of the legal profession rejects both the denigrated role of the advocate and counselor that renders him a lackey to the client and the alien idea that he is an agent of government. . . .
>
> The very independence of the lawyer from the government on the one hand and client on the other is what makes law a profession, something apart from trades and vocations in which obligations of duty and conscience play a lesser part. It is as crucial to our system of justice as the independence of judges themselves. . . .

---

[148] Stewart, *Professional Ethics for the Business Lawyer: Morals of the Market Place*, 31 Bus. Law. 462, 468 (1975). Justice Stewart also raised a number of related questions:

> [A]side from the inescapable responsibility that his profession places upon every lawyer to act as a wholly honorable and trustworthy person and a good law abiding citizen, is there any way in which a business lawyer can better serve the public interest than by giving the best possible legal advice to his clients? Is it the duty of a lawyer, by contrast, to try to impose upon his clients his own notions of social, or political or economic morality? Is it indeed even 'ethical' for him to try to impose his own system of moral priorities and social values on his clients' business decisions, in the guise of neutral legal advice?

Id.

[149] 413 U.S. 717 (1973).

[150] *Id.* at 729, *quoting* Cammer v. United States, 350 U.S. 399, 405 (1956).

> In some countries the legal system is so structured that all lawyers are literally agents of government and as such bound to place the interests of government over those of the client. That concept is so alien to our system with an independent bar that I find it difficult to see how nationals of such a country, inculcated with those ideas and at the same time unwilling to accept American citizenship, could be properly integrated into our system.[151]

Although the statement of *Touche Ross* that the SEC has implied authority to promulgate standards "to protect the integrity of its administrative procedures"[152] appears unobjectionable,[153] the court's further conclusion that implied authority exists to prescribe professional standards "to protect . . . the public in general"[154] cannot be accepted as easily, especially in light of the SEC's announcement in *Carter and Johnson* which many feel borders on making attorneys agents of the government.[155] As SEC Commissioner Karmel stated (after *Touche Ross*, but before *Carter and Johnson*) in her dissent in *Keating, Muething & Klekamp*, "By utilizing Rule 2(e) to implement a program of professional protection, the Commission is not limiting its disciplinary powers to assuring the proper administration of justice. . . . [A] Pandora's box of misguided standard-setting regulation'' is being opened.[156] Without doubt, Ms. Karmel would characterize *Carter and Johnson* as such[157]

---

[151] 413 U.S. at 732, 733. The other dissenter, Justice Rehnquist, recorded his thoughts in a companion case to *Griffiths*, Sugarman v. Dougall, 413 U.S. 634, 663 (1973).

[152] 609 F.2d 570, 582 (2d Cir. 1979).

[153] In light of the legislative history of the Agency Practice Act (5 U.S.C. § 500), one can reasonably conclude that the Congress intended to leave with federal agencies authority to promulgate "traditional" standards of professional conduct (*i.e.*, of the type present in 1965) relating to maintenance of order in and integrity of agency proceedings. The SEC's opinion in *Carter and Johnson* contains a representative sample of the legislative history on this point. See *Carter and Johnson*, *supra* note 118, at 6 n. 9:

> For example, in discussing the bill which ultimately was enacted, Congressman Willis stated that "[i]t does not affect the power of agencies to discipline persons who appear before them." 111 Cong. Rec. H. 27193 (Oct. 18, 1965). Similarly, Representative Poff remarked: "The bill in no way modifies the authority of agencies to discipline persons before them. . . ." Ibid. Further, the Senate Report on this proposed law stated: "If matters of ethical conduct are brought to the attention of the agencies, adequate tools are at their disposal to deal with the situation." S. Rep. No. 755, 89th Cong., 1st Sess. 5 (1965). And, in a letter to Senator Eastland, then Deputy Attorney General Katzenbach confirmed the Administration's understanding that the bill "does not modify the authority of agencies to discipline persons appearing before them. . . ." He remarked that the Department of Justice
>
> > ha[d] eliminated formal admission procedures and special examinations for practice before the administrative boards and agencies under its supervision. The Department, however, has retained the power to discipline attorneys. . . .
>
> Further, after noting that "the bill retains in Federal agencies an element of control, particularly in disciplinary situations," he concluded that, "[s]ubject to the foregoing, the Department favors enactment of the measure." The Katzenbach letter to Senator Eastland was annexed to H.R. Rep. No. 1141 and set forth at *2 U.S. Code Cong. & Ad. News* at 4178 (1965).

[154] 609 F.2d 570, 582 (2d Cir. 1979).

[155] See note 120, *supra* and accompanying text.

Even though the SEC may be in the process of reassessing its approach to regulating attorneys who practice before the Commission,[158] shifts in policy often reverse with personnel changes. In addition, the SEC is only one agency and the language of *Touche Ross* is available to other agencies which might be inclined to follow its lead. To clarify the status of those agencies which depend on *implied* authority to promulgate standards to regulate attorneys, the Congress should amend the Agency Practice Act to address expressly the promulgation of standards of conduct for attorneys practicing before federal agencies.

As the Congress is the branch of government with responsibility for regulating attorneys practicing before federal agencies (the arguments already having been made that such is the case[159]), the Congress has the power to decide by whom the standards are to be promulgated.[160] In those instances where agencies have been *expressly* authorized to promulgate rules and to regulate the conduct of attorneys, a Congressional choice has been made. Where the Congress has not expressly spoken, however, several alternatives exist. Legislation could expressly authorize all federal agencies to adopt such standards. This approach, although simplest (and perhaps least costly), would not reach the concerns addressed, *supra*, specifically: balkanization of professional standards to which attorneys are subject, *ad hoc* proscriptions which may or may not be consistent with the overall responsibilities of attorneys, and potential enlistment of attorneys to enforce substantive law via ethical standards.

---

[156] 45 Ad.L.2d 1072, 1083, 1087 (1979). One approach facilitating greater disclosure in the securities area was suggested in a letter to the author from Thomas Lumbard (April 12, 1982), a copy of which is on file with the Administrative Conference of the United States:

> The solution to many of the agencies' problems, it seems to me, is more imaginative use of their power to regulate ''practice and procedure,'' *qua* practice and procedure, rather than the power to regulate the conduct of practitioners. If the SEC wants lawyers to make inquiries not normally required of counsel for parties, the SEC can require that certain papers must be accompanied by an affidavit of counsel that such inquiries have been made, and that counsel is satisfied that the statements in the prospectus, or the 10-K, or the annual report, are neither false nor misleading. A lawyer would be disbarred for making a false affidavit of that sort to the SEC, just as a lawyer would be disbarred for making a false certificate of good faith in a federal court that required a pleading to be accompanied thereby.

[157] *See, e.g.*, ''Karmel Blasts SEC Discipline of Lawyers,'' 67 ABAJ 1097 (1981).

[158] *See, e.g.*, Speech by SEC General Counsel Edward F. Greene, New York County Lawyers' Association (Jan. 13, 1982), *reprinted in* 4 Legal Times Washington, p. 25, Col. 1 (Jan. 25, 1982).

[159] *See* notes 29 to 64, *supra* and accompanying text.

[160] An argument could be made that the Congress should either: one, renounce its power to regulate attorneys practicing before federal agencies in favor of state regulation—a likelihood which seems quite remote and which was pointed out repeatedly by persons speaking before the ABA House of Delegates on August 11, 1982, in favor of the Franck Proposal, *supra* note 7 (*see* note 206, *infra*) or two, simply make individual state standards of conduct the basis for federal attorney disciplinary proceedings, with which state's standards to apply to depend on where the accused attorney was licensed. The latter would truly result in a balkanization of standards at the federal level. Attorneys practicing before the same agency could be subject to different standards of conduct depending on where they were licensed to practice. As neither of these alternatives seem likely, promulgation of standards of conduct for attorneys practicing before federal agencies will be undertaken, if at all, by an authority at the federal level. As the representatives of the Standing Committee pointed out to the 1982 A.B.A. House of Delegates, federal standards are nothing new. Attorneys have long been subject to standards of discipline adopted by federal courts. *See* note 206, *infra*.

On the other hand, the Congress could require uniform standards be formulated (with or without the possibility of additional standards, not inconsistent with the basic standards, necessitated by individual agency requirements).[161] This choice would be costlier than the other alternative and, thus, the question of need must be faced. Does the extent of attorney misconduct before federal agencies justify expenditure of additional federal monies to regulate attorneys?

The nature, frequency, and pervasiveness of attorney misconduct in the federal administrative process is not precisely known. A chart prepared by the Director of the ABA National Center for Professional Responsibilities[162] and responses to the Federal Questionnaire sent out to selected federal agencies, as well as correspondence/comments received and acquired,[163] indicate that extensive misconduct by attorneys practicing before federal agencies cannot be documented at present. Lack of documentation, however, may be misleading because records are not uniformly kept with regard to misconduct before federal agencies.[164] For example, of the thirty-six licensing authorities which responded to the State Questionnaire,[165] over twenty-five percent indicated that no statistics were available on misconduct by attorneys before federal agencies. In addition, almost twenty percent failed to answer the question requesting data on this attorney misconduct—a "response" which may indicate no data available or, at least, not readily accessible. Officials at the SEC also have indicated that instances of potential attorney misconduct are not, as a matter of course, recorded and filed separately by Commission personnel but rather remain buried in the records of the Commission.[166]

---

[161] Of the federal agencies responding to the Federal Questionnaire (*see* notes 16 and 89, *supra* and Appendix A), the great majority (approx. 66%) indicated that uniform standards were not necessary (QUESTION EIGHT) and almost 50% responded that they had (and found desirable) particularized standards for their agencies (QUESTIONS THREE AND FIVE). On the other hand, if uniform standards were promulgated, almost 70% of those responding did not believe any agencies should be exempted from the uniform standards (QUESTION TEN). If uniform standards were to be promulgated, opportunity should be provided to permit agencies to present their requirements for particularized standards. To prohibit particularized standards at the outset, without consideration of the particular circumstances and problems facing federal agencies, would seem to oversimplify the complexities which face the agencies. *See, e.g.*, Marquis, *An Appraisal of an Attorney's Responsibility before Administrative Agencies*, 26 Case W. Res. L. Rev. 285, 287–304 (1976). Uniformity (with exception), although perhaps a contradiction in terms, can be obtained within limits, as has been demonstrated by the standards of conduct for conflict of interest promulgated by federal agencies under the guidance of the Office of Government Ethics. *See* 5 C.F.R. Part 735 (1982).

[162] The National Center for Professional Responsibilities is located at 77 South Wacker Drive, Chicago, Illinois 60606. The Chart, prepared by its Director (Ms. Jeanne Gray), is reproduced in Appendix B.

[163] *See* note 16, *supra*.

[164] For example, an instance of attorney conduct that might have otherwise gone undocumented except in agency files was noted by the United States Court of Appeals for the District of Columbia: "Our review of the hearing transcript reveals that Presiding Official Bogle showed remarkable restraint in the face of rude and arrogant behavior by petitioner's counsel, Mr. Alexander. The record is replete with insolent outbursts, contemptuous remarks and hubristic responses addressed to both witnesses and the presiding Official by attorney Alexander. This conduct of counsel far exceeded the bounds of legitimate advocacy and was generally well short of the decorum expected of a member of the bar." Gibson v. Veterans Administration and the United States, No. 81-1933, Slip Op. at 8 (D.C. Cir. July 13, 1982).

[165] *See* note 28, *supra*, and Appendix A, State Questionnaire (QUESTION ELEVEN).

Another factor relevant to whether Congressional action should be taken at this time is the perennial nature of the concern shown by the bar, as well as by federal agencies, with respect to discipline of attorneys practicing before federal agencies.[167] The Congress addressed the matter in 1965 with the enactment of the Agency Practice Act (5 U.S.C. § 500), a statute which has failed to subdue the hearty debate over standards of conduct and who should impose discipline. As a consequence, a clear Congressional statement on standards of conduct for attorneys practicing before federal agencies is needed to resolve the current controversy.

Should the Congress, however, draft the standards and enact them into law?[168] The answer should be in the negative. The deliberations required to produce professional guidelines for attorneys seems inappropriate, both in potential duration and nature, for the Congress. Standards of conduct for the practice of law should not be debated, drafted, and effected in the political and partisan atmosphere of the Congress. The process should be a concentrated effort, which could be lengthy and one that should not be pre-empted by matters which are (or are perceived to be) more urgent. In addition, standards of this nature should not have the rigidity of being cast in statutory form; non-Congressional promulgation would provide greater flexibility for the agencies and the legal profession to respond to change. The responsibility for formulating standards of conduct for attorneys practicing before federal agencies is one that the Congress should delegate, with appropriate guidance to ensure that any standards ultimately adopted are within (and remain within) the mainstream of legal thinking on professional responsibility. A number of delegates are possible, *e.g.*: the federal judiciary, an *ad hoc* body, a new agency, or an existing agency.

---

[166] The Commission has begun a review of its files to identify instances of potential attorney misconduct, but the review is not available at this time. *See* letter to author from Stephan E. Cavan (May 13, 1982) (indicating intention to begin the search), a copy of which is on file with the Administrative Conference of the United States. Subsequent oral communications with Paul Gonson, SEC Solicitor, indicate that the review, although begun, is still unavailable.

[167] *See* note 1, *supra*.

[168] Of the agencies responding to the Federal Questionnaire (*see* notes 16 and 89, *supra*, and Appendix A), a choice was given for who should promulgate uniform standards: ABA; Federal Courts; Congress; Ad Hoc Group Attorneys; Ad Hoc Group (Agency Personnel); Ad Hoc Group (Attorneys/Agency Personnel); and other (QUESTION NINE). Although the preferences shown by the responses were somewhat inconclusive, general counsels responding indicated little support for a Congressional promulgation; however, the chief administrative law judges tended to select the Congress as the promulgator.

Assigning the task to the federal judiciary, one can argue, would also be inappropriate even though judges may have experience with discipline of attorneys. The issue in question is not misconduct before a federal court, however, but practice before federal agencies by Congressionally-admitted, not judicially-admitted, attorneys.[169] Some of the same objections to Congressional enactment of standards are equally applicable to judicial promulgation. The process could be lengthy, involve resources beyond those reasonably available to the judiciary, and could be partisan in nature. The argument can be made, therefore, that, at least with regard to promulgating applicable standards, the criteria against which attorney conduct is to be judged should be administratively, not Congressionally or judicially, generated. In fact, the judges of the United States District Court for the District of Columbia unanimously rejected an overture by the ABA to be the promulgating body for uniform standards.[170]

Although an *ad hoc* body could be established to promulgate the standards, a severe shortcoming exists to this alternative, which to some extent is applicable to the alternatives already rejected. More needs to be done than just promulgate and disband—changes will have to be made, interpretations will have to be given, and the like.[171] These functions an *ad hoc* group cannot perform. To establish a new agency would not seem to be justified financially at this time because of the absence of a clearly documented record of attorney misconduct before federal agencies. Assigning the responsibilities, however, to an existing agency, if one could be identified that has expertise in the area of ethical standards, would seem appropriate. Ideally such an agency—already established with personnel, procedures, and accumulated experience—could perform the required rulemaking and continuing responsibilities without a prohibitive increase in appropriation of funds. Arguably that agency exists.

---

[169] *See* notes 65 *et seq.*, *supra*, and accompanying text. Although the Congress has by 5 U.S.C. § 500 determined that if an attorney is licensed by a state court and is currently in good standing, (s)he may practice before federal agencies, a state license (by, in, and of itself) is not the authority for a person to practice before federal agencies. The Congress has set the admission requirements for practice before federal agencies which is a state license. The Congress theoretically could have set some other requirement, *e.g.*, passing a federal bar examination. For example, a state license to practice law does not entitle a person to practice before the Patent and Trademark Office; the Congress has permitted that agency to impose its own requirements. *See* 5 U.S.C. § 500(e) (1976).

[170] *See* letter to Jeanne P. Gray from John Lewis Smith, Jr. (Mar. 5, 1982): "This is to advise that the Judges of this Court in Executive Session voted unanimously against the proposal [1/25/82 Franck Proposal, *supra* note 12]. In particular, we are opposed to Rule 2(A) which involves this Court in the promulgation and monitoring of the standards." A copy of Chief Judge Smith's letter is on file with the Administrative Conference of the United States. Little support for judicial promulgation of uniform standards was reflected in the responses to the Federal Questionnaire (*see* notes 16, 89, and 168, *supra*).

[171] Some support for promulgation of federal standards of conduct by an *ad hoc* group of attorneys and agency personnel was reflected in the responses of general counsels to the Federal Questionnaire (QUESTION NINE); however, the other possible *ad hoc* groups gathered few responses from either the general counsels or the chief administrative law judges. The other possible responses to QUESTION NINE (*i.e.*, The ABA and Other) drew few selections. The most popular "other" selection was the Administrative Conference of the United States. *See* note 168, *supra*.

In 1978, the Ethics in Government Act created the Office of Government Ethics,[172] *inter alia*, to "centralize executive responsibility . . .; provide guidance to agencies; issue clear and understandable standards of conduct; [and] provide advisory opinions."[173] The Office of Government Ethics through its Director is currently funded, of course, to perform these functions (and others) with regard to "preventing conflicts of interest on the part of officers and employees of any executive agency, as defined in Section 105 of Title 5."[174] Section 105 includes within its definition of "executive agancies" so-called "independent agencies (*e.g.*, SEC, NLRB, ICC, and the like).[175]

In carrying out its current statutory responsibilities, the Office of Government Ethics promulgated (through the Office of Personnel Management (OPM)) uniform standards relating to ethical conduct.[176] Each agency is required to promulgate its own standards which must contain, at minimum, the uniform standards, as well as any other non-inconsistent additional standards "appropriate to the particular functions and activities of the agency."[177] Individual agency regulations must be approved by OPM prior to publication and becoming effective; however, an agency may adopt the uniform standards without additions.[178] For ease of reference, all agency standards promulgated under this requirement have been published under the same "Part Number" of the C.F.R., *i.e.*, C.F.R. 0.735 [*e.g.*, 31 C.F.R. 0.735 (Treasury); 29 C.F.R. § 0.735 (NLRB); 7 C.F.R. § 0.735 (USDA); etc.], a practice that would be helpful with regard to professional standards governing attorneys.

Although the financial impact of assigning the responsibility of promulgating and monitoring professional standards for attorneys practicing before federal agencies to the Office of Government Ethics is not known (and its calculation is not within the scope of this presentation), of the alternatives available, the use of an existing agency with expertise in the area of ethical standards—the Office of Government Ethics—would seem to be the least expensive, as well as the most attractive, choice.

With regard to the latter point (*i.e.*, selecting an "attractive choice"), professional responsibility for attorneys is not only for the benefit of the legal profession, but also of the public. In recent years, beginning with the revelations of attorney misconduct associated with events commonly called Watergate, the ethicality and professionalism of attorneys has been cast in doubt. By placing responsibility for professional standards for attorneys practicing before federal agencies with the Office of Government Ethics, the Congress can send a message to the American public that the federal government is serious about requiring attorneys at the federal level to be professional and to be ethical. Because of the advantages offered by utilizing the Office of Government Ethics—economic, expertise, experience, and for lack of a better word, public relations—the Agency Practice Act and the Ethics in Government Act should be amended to assign the responsibility of developing and monitoring uniform[179] standards of conduct for attorneys practicing before all federal agencies (except to the extent that the Congress has provided otherwise) to the Office of Government Ethics, a function which should be implemented in the same manner in which the Office has carried out its responsibilities relating to conflict-of-interests standards.[180]

---

[172] Ethics in Government Act, Title IV, 5 U.S.C. App. I § 401 (Supp. IV 1980).

[173] 1978 *U.S. Code Cong. & Ad. News* 4246, 4247.

[174] 5 U.S.C. App. I § 402 (Supp. IV 1980).

[175] 5 U.S.C. § 105 (1976) defines federal agency: "For purposes of this title [*i.e.*, Title 5], 'Executive agency' means an executive department, a Government corporation, and an independent establishment." The legislative history to the 1979 amendments to Ethics in Government Act clearly indicates that "independent agencies" such as the FCC and SEC are included within this definition of "Executive Agency." See 1979 *U.S. Code Cong. & Ad. News* 145.

[176] 5 C.F.R. Part 735 (1982).

[177] 5 C.F.R. § 735.104(a)(2) (1982).

[178] 5 C.F.R. § 735.104(a), (f) (1982).

Any uniform standards drafted to define the professional conduct of attorneys practicing before federal agencies must, of necessity, address a number of related issues, some of which are discussed briefly without regard to priority. For example, if laypersons are permitted to practice before a particular federal agency, should they be subject to the same standards of conduct as attorneys? The two proposals presented to the ABA House of Delegates on August 11,

---

[179] *See* note 161, *supra*.

[180] The drafting of such detailed and extensive legislation is considered beyond the scope of this presentation; however, the intent and nature of the proposed amendment (and its administrative implementation) can be suggested: "The Agency Practice Act (5 U.S.C. § 500) [*see* note 235, *infra*] and Title IV of the Ethics in Government Act (5 U.S.C. App. I §§ 401 *et seq.*) should be amended to assign the responsibility for developing, promulgating, and monitoring uniform standards of conduct for attorneys practicing before all federal agencies [except to the extent the Congress has expressly provided otherwise] to the Director, Office of Government Ethics, by legislation similar in nature to Title IV of the Ethics in Government Act of 1978, as amended (*see*, 5 U.S.C. App. I §§ 402, 403, 404); the Congress should make appropriations to the Office of Personnel Management adequate to implement this responsibility; and the Congress should amend 5 U.S.C. App. I § 405, as required. The standards promulgated should be published in the Code of Federal Regulations under the same "Part Number" and should be uniform except to the extent that additional standards are required by the functions and activities of a particular agency, any such additional standards to be approved by the Office of Personnel Management prior to publication and becoming effective (*see*, *e.g.*, 5 C.F.R. § 735.104)." [*Note*: If the standards of conduct were to apply not only to practitioners, but also to government attorneys, the responsibilities of receiving complaints of proscribed conduct by an employee or member of an agency; of presenting allegations of that proscribed conduct (and accompanying documents) to a federal district court; and, if the judicial proceeding is not terminated by the court, of presenting the case in chief should be assigned to the Director, Office of Government Ethics (or his designate) by amendment of 5 U.S.C. App. I §§ 402, 403, 404]; *see* note 235, *infra*. Appreciation is expressed to Peter L. Strauss (Professor of Law, Columbia University) whose suggestion early in this study, albeit in a different context, that "[p]erhaps an independent federal body, operating under the Office of Personnel Management or some other safe harbor, would be appropriate . . .," raised the possibility of OPM's participation in the matters generally under consideration; however, his comment was made with reference to adjudicating disciplinary complaints, not establishing standards. *See* letter to author from Peter L. Strauss (May 6, 1982), a copy of which is on file with the Administrative Conference of the United States.

1982, answered in the negative.[181] In general,[182] both proposals would remove regulation of attorneys from federal agencies while leaving laypersons subject to the jurisdiction of the agencies. This consideration will not be discussed in detail because this presentation relates to regulation of attorneys, not laypersons, practicing before federal agencies;[183] however, the proposals made herein could be applicable to all persons who practice before federal agencies, not just attorneys.

In 1975, Joseph Daley and Roberta Karmel noted in their frequently cited article, ''Attorneys' Responsibilities: Adversaries at the Bar of the SEC,''[184] that a double standard exists with regard to conduct of staff attorneys and private practitioners: ''Another telling argument against the duties which the SEC is preaching to attorneys is that in cases where SEC staff-attorneys have been urged to assume similar duties, the SEC has asserted privilege and resisted responsibility.''[185] If uniform standards are adopted, should they apply to both sides—private practitioners *and* government attorneys? Although employment actions may, of course, be taken against government attorneys for improper conduct, may a dismissed government attorney be denied eligibility to practice before federal agencies on the basis of the misconduct that led to the dismissal unless her/his state licensing authority has acted on the misconduct?[186] The Agency Practice Act would seem to indicate a negative response (except perhaps for the former employer[187])—the only admission to practice requirement is being a member in good standing of a state bar.[188] If government attorneys were subject to the same standards as private practitioners, the double standard about which Daley and Karmel wrote might be eliminated.[189]

---

[181] *See* Franck Proposal, *supra* note 7 and Waxman/Forrest Proposal, *supra* note 8.

[182] Since the Waxman/Forrest Proposal, *supra* note 8 would permit agenices which currently have express authority to adopt standards to continue to do so, those agencies would be able to apply the same standards to both attorneys and laypersons.

[183] *See* note 4, *supra*.

[184] 24 Emory L.J. 747 (1975).

[185] *Id.* at 812.

[186] *See* notes 23–28, *supra* and accompanying text. The observations made, *supra*, are not limited to private practitioners who are not subject to the local discipline authority, but apply with equal force to government attorneys who are not employed within their licensing states.

[187] The Agency Practice Act (5 U.S.C. § 500) indicates that its provisions do not ''authorize an individual who is a former employee of an agency to represent a person before an agency when the representation is prohibited by statute or regulation.'' 5 U.S.C. § 500(d)(3). The sparse legislative history that is available on this paragraph indicates that the exception was included so as not to ''modify the authority of agencies to . . . prevent former employees from representing persons appearing before the agencies to avoid conflict-of-interest situations.'' Letter to Hon. James O. Eastland from Nicholas deB. Katzenbach (June 10, 1963), reprinted in 1965 *U.S. Code Cong. & Ad. News* 4178. Professor Donald T. Weckstein in his 1970 study for the Administrative Conference of the United States also concluded that avoidance of conflict of interests was the purpose of this paragraph. See Weckstein, *Control of Practice and Discipline of Representatives before Federal Administrative Agencies*, A Study and Recommendations for the Administrative Conference of the United States 65–66 (Preliminary Draft 1970). As a consequence, whether former employees who are not subject to conflict-of-interest, post-employment restrictions may be denied eligibility to practice before their former agencies because of misconduct is unclear. See notes 72–77, *supra* and accompanying text.

[188] 5 U.S.C. § 500(b) (1976).

With regard to private practitioners, unique, ethical quandaries may arise when an administrative agency becomes involved in clients' affairs. In responding to these situations, whether an attorney is in-house or retained may be relevant.[190] Should these types of special problems be addressed or are they resolved adequately by the professional standard proposed by the American Bar Association—whether that be the Code of Professional Responsibility or its successor? A related inquiry would involve, of course, such issues as: Are American Bar Association recommendations on professional responsibility too much of a compromise work product produced by a "political adoption process",[191] and do they emphasize too strongly the adversary environment of a trial-oriented practice of law[192] to be used as a model for uniform standards of conduct for attorney practice before federal agencies?

Another issue deserving consideration by the promulgating authority involves subjecting an attorney practicing before federal agencies to professional standards too much at variance from those of her/his licensing state(s). How is an attorney to know which standard to follow if a conflict exists between federal and state standards? One solution to this dilemma is to apply the strictest standard. This might be a reasonable approach provided the attorney knows that (s)he is subject to both standards. What about the attorney, however, far removed from Washington, D.C., who gives advice to a client involving a federal agency. Does that advice bring the attorney within the coverage of federal standards and if so, would the attorney reasonably understand that by giving the advice, (s)he has just subjected her/himself to another professional responsibility regulatory system? The answer is, "That depends." Whenever standards are promulgated to apply to attorneys practicing before federal agencies, whether on an *ad hoc* basis by an agency or uniform standards by a neutral authority such as the Office of Government Ethics, the "That depends" must be considered and resolved.

The proposals submitted to the ABA House of Delegates on August 11, 1982, addressed in different ways, at what point an attorney becomes subject to federal standards and when (s)he is subject only to the standards of the licensing state(s). One proposal would subject an attorney to federal standards when attorney conduct involves a "Direct Appearance" before an agency, *i.e.*, "An actual appearance before the agency in a hearing or similar proceeding or the filing with the agency of a document which is signed by, or is otherwise submitted on the authority of, the practitioner.''[193] The other proposal would limit federal standards to situations ``affecting [an] attorney's participation in a particular proceeding before it, as immediately necessary to maintain order in or assure the integrity of such proceeding.''[194]

---

[189] Of course, federal agencies would have to be authorized to deny eligibility to practice to an attorney who has been disciplined by a federal agency. This would require amendment of the Agency Practice Act; *see* note 112, *supra*.

[190] For a discussion of the issues involved, *see, e.g.*, Pickholtz, *The Proposed Model Rules of Professional Conduct—and Other Assaults Upon the Attorney-Client*, 36 Bus. Law. 1841, 1854–55 (1981); Mundheim, Should Code of Professional Responsibility Forbid Lawyers to Serve on Boards of Corporations for Which They Act as Counsel, 33 Bus. Law. 1507 (1978); Subak, Special Problems of Inside Counsel, 33 Bus. Law. 1433 (1978).

[191] Sutton, *How Vulnerable is the Code of Professional Responsibility?*, 57 N.C.L. Rev. 497 (1979).

[192] Marquis, *An Appraisal of Attorneys' Responsibilities before Administrative Agencies*, 26 Case Wes. Res. L. Rev. 285 (1976).

A basic consideration in the regulation of attorneys, thus, is to what types of misconduct should federal standards apply? Many persons who have analyzed regulation of attorneys practicing before federal agencies seem to agree that federal agencies should be able to regulate attorneys with regard to conduct involving contumacious behavior committed in the course of *an* agency proceeding, so as to maintain order in (and perhaps integrity of) *the* proceeding, with any discipline therefor limited to *that* proceeding.[195] This is the position of the second proposal, *supra*. Others would expand the applicability of federal standards to cover attorney misconduct committed in a representative capacity but not necessarily committed in the presence of the agency. The first proposal's scope reaches, within its defined limits, also into this area. A third category of potential misconduct involves the failure of an attorney to ``live up to'' an agency's special concept of professional responsibility relating to the agency's substantive regulatory responsibilities which may or may not involve representation of a client before the agency,[196] *e.g.*, the interpretation announced in *Carter and Johnson*.[197]

Subjecting an attorney to standards of conduct (and, thus, to discipline) without adequate notice of the regulatory system's applicability, one can argue, has constitutional overtones.[198] The United States Supreme Court has indicated on a number of occasions that the right to practice law may not be taken away without due process.[199] Adequate notice is one of the basic components of due process.[200] The answer that if one is confronted with a client who has a federal administrative law question, one has the obligation and responsibility to review all the applicable rules and regulations prior to giving any advice oversimplifies the realities of practicing law. Many attorneys do not have ready access to the Code of Federal Regulations, much less the Federal Register. What has to be determined is where the dividing line for applicability of federal standards of conduct is—one that not only satisfies due process, but also is readily recognizable. As a consequence, the proper response to conflicting standards may not be to apply the strictest, but rather to apply each standard to its own domain—federal standards to those areas where they may constitutionally be applied and state standards to the remainder. Violation of federal standards should be pursued in a federal forum, leaving enforcement of state standards to the states.

---

[193] *See* Franck Proposal, *supra*, note 7. Rule 3 specifically provides: ``The jurisdiction conferred by these rules shall not be construed to deny any agency the powers immediately necessary to maintain control over its proceedings. . . .''

[194] *See* Waxman/Forrest Proposal, *supra* note 8, Resolution 2(b).

[195] *See, e.g.*, notes 193 and 194, *supra* and accompanying text. With regard to standards governing this type of misconduct, should individual agencies be permitted to adopt their own standards? *See, e.g.*, Camp v. Herzog, 104 F. Supp. 134 (D.D.C. 1982). One can argue that this should be the case, but if uniformity among federal agencies as to standards is a goal, no compelling reason seems to exist why standards governing contumacious behavior should be treated differently than other standards, especially if agencies have an opportunity to adopt standards in addition to the uniform standards if the requirement can be demonstrated. *See* note 180, *supra*.

[196] *See*, note 27, *supra* and accompanying text.

[197] *See* notes 120 et seq., *supra* and accompanying text.

[198] For a discussion of the requirement of a person's having notice of jurisdiction, *see* R. Weintraub, Commentary on the Conflict of Laws, § 4.4 (2d Ed. 1980).

[199] *See, e.g.*, *In re* Ruffalo, 390 U.S. 544 (1968); Theard v. United States, 354 U.S. 278 (1957); Schware v. Board of Bar Examiners, 353 U.S. 236 (1957); *Ex Parte* Robinson, 86 U.S. 505 (1873).

Standards, however, without effective enforcement benefit no one—not the legal profession, not federal agencies, and not the public. The final aspect, therefore, of regulating attorneys practicing before federal agencies involves who should impose discipline for a violation of federal standards of conduct.

Discipline of Attorneys Practicing before Federal Agencies

Officials at the Securities and Exchange Commission have indicated that "it must be recognized that federal administrative agencies are unlikely to voluntarily cease the disciplining of attorneys and other professionals for misconduct unless a substitute mechanism that is truly effective becomes available."[201] This conclusion would seem to be accurate. On the other hand, the Commission does "not oppose the creation of an independent model disciplining mechanism. . . . [as] such a body would relieve the agencies of the need to devote their scarce resources to this task."[202] Two proposals presented to the ABA House of Delegates on August 11, 1982, made recommendations on the discipline of attorneys practicing before federal agencies. The House of Delegates adopted the shorter, less complicated recommendation:

---

[200] *See, e.g.*, Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 314 (1950): "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendancy of the action."

[201] Submission of the General Counsel and Solicitor of the Securities and Exchange Commission to the American Bar Association Standing Committee on Professional Discipline Concerning Discipline of Lawyers Who Practice Before Federal Agencies 3 (Mar. 19, 1981) [Hereinafter referred to as the Ferrara/Gonson Proposal], a copy of which is on file with the Administrative Conference of the United States. At the time the proposal was drafted Ralph C. Ferrara was General Counsel of the SEC and Paul Gonson was its Solicitor.

[202] Letter to Michael Franck from Paul Gonson (July 28, 1982), forwarding the position of the SEC on discipline of attorneys practicing before federal agencies, a copy of which is on file with the Administrative Conference of the United States. The SEC reiterated the position taken by its officials earlier (*see* note 201, *supra*) that any non-agency disciplinary mechanism must be "truly effective." *Id.*

RESOLVED, That the American Bar Association endorses the enactment of legislation which would provide that:

1. Except as existing legislation expressly provides, no federal agency shall adopt standards of practice to govern the professional conduct of attorneys who represent clients subject to the administrative procedures of or regulation by that federal agency, except such standards of practice as required to apply subparagraph 2(b) below to maintain order in or assure the integrity of proceedings before it.

2. Except as existing legislation expressly provides, a federal agency shall exercise disciplinary authority over an attorney only:

   (a) in conformity with formal disciplinary action taken against such attorney in a jurisdiction where such attorney is admitted to practice; or

   (b) affecting such attorney's participation in a particular proceeding as immediately necessary to maintain order in, or assure the integrity of, such proceeding.

RESOLVED, That the American Bar Association recognizes that it is important that state disciplinary authorities afford federal agencies an effective means of securing review of charges by such federal agencies of professional misconduct arising out of the practice of attorneys before the agencies; and that it is a matter of clear and important policy of the American Bar Association to encourage and assist state disciplinary authorities to fulfill this function.

RESOLVED, That the American Bar Association authorize the Standing Committee on Professional Discipline to initiate and coordinate efforts to assure that state disciplinary authorities function in a manner which provides federal agencies with an effective forum to which professional responsibility complaints arising out of agency practice can be brought; and, to this end, the Standing Committee shall establish liaison with appropriate state bar associations or other groups within each state which would directly undertake these efforts at the state level.[203]

---

[203] *See* Waxman/Forrest Proposal, *supra* note 8. The proposal was sponsored by ten organizations: The ABA Sections of Administrative Law; Corporation, Banking and Business Law; Natural Resources Law; Patent, Trademarks and Copyright Law; Public Contract Law; Public Utility Law; and Taxation; by the ABA Special Committee on Lawyers in Government; by the ABA Judicial Administration Division; and by the Federal Communications Bar Association. Prior to introducing the Waxman/Forrest Proposal to the House of Delegates, the proposal as originally filed with the ABA was amended, *i.e.*, the first seven words of paragraphs 1 & 2 of the first Resolved ("In the absence of express statutory authority") were changed to that quoted, *i.e.*, "Except as existing legislation expressly provides." *See* note 130, *supra*. Although an extensive analysis of the Proposal is not warranted, a few comments should be made. The underlying concept of the Waxman/Forrest Proposal is use of *state* disciplinary mechanisms to pursue allegations of conduct, proscribed by *state* standards, committed by attorneys practicing before federal agencies. Although emphasis on state regulation of such attorney misconduct may appeal to a state-oriented body such as the ABA House of Delegates, little likelihood would appear to exist that the Congress would abandon (and one can add—or should abandon) at this time its power in this area without convincing evidence that the states can provide effective regulation of attorneys practicing before federal agencies. (*See* note 206, *infra*). The concerns of the federal government are not new. In 1955 the Hoover Commission Task Force specifically pointed to the "hiatus in the effective discipline of many lawyers in the Administrative Law practice" (*see* note 23, *supra*), a conclusion again validated by the Clark Report

The other proposal is too lengthy to reproduce,[204] but its main features can be described briefly: (1) in general, removal of jurisdiction from federal agencies to conduct attorney misconduct proceedings; (2) referral of complaints of attorney misconduct before federal agencies to the bar counsel of the attorney's licensing state, who would investigate the charges and prosecute the case before an appropriate United States District Court, and (3) promulgation of uniform standards of conduct by the United States District Court for the District of Columbia. The actual recommendation contained in the proposal was less than one-half page, but incorporated by reference nine definitions and twenty-four proposed "Rules for Federal Agency Discipline." The proposed rules were the result of almost three and one half years work by the ABA Standing Committee on Professional Discipline.[205] As stated, a choice was made; the American Bar Association adopted the shorter, less complicated recommendation.[206]

---

in 1970 (*see* note 24, *supra*) and which still appears to be warranted today (*see* notes 25 and 28, *supra*). Until the states can document effective regulation of attorneys practicing before federal agencies, implementation of the Waxman/Forrest Proposal does commend itself.

[204] *See* Franck Proposal, *supra* note 7. Two of the principal contributions of the Franck Proposal are identification of a forum (*i.e.*, federal district court) to adjudicate allegations of attorney misconduct before federal agencies and recognition that, as a general principle, the standards of conduct should not be promulgated by the federal agencies themselves. In suggesting implementation of these concepts, however, the Franck Proposal included a number of features which reduce its overall attractiveness. Foremost is use of *state* bar counsels to investigate and to prosecute the alleged violations of *federal* standards. Eighty-six percent of the jurisdictions responding to the State Questionnaire (*see* notes 16 and 28, *supra*) indicated that they "*only* [had] authority to investigate, discipline, etc. an attorney licensed to practice by [their] state for a violation of a standard adopted by some official body (*e.g.*, court, legislature, bar association) of [their] state." (QUESTION TWO) In other words, the overwhelming number of bar counsels responding do not appear to have authority to use state resources to enforce federal standards, thus undermining a fundamental part of the Franck Proposal. The report accompanying the Waxman/Forrest Proposal (*see* note 8, *supra*) pointed to the same problem, but from a different perspective: "While Congress can condition the grant of federal funds upon state adoption and enforcement of related state laws (*e.g.*, conditioning highway funds upon state adoption and enforcement of a 55 mph speed limit), it is extremely doubtful that Congress can require the states to use their executive powers to enforce a *federal* law or regulation. *Cf.* National League of Cities v. Usery, 426 U.S. 833 (1976). Thus, even if Congress were to adopt the Model Rules' extraordinary provision that with regard to the federally-adopted standards state disciplinary enforcement authorities 'shall . . . [p]erform all prosecutorial functions including investigation.' it is questionable whether those authorities would have to comply." In response to this criticism, the Franck Proposal was amended on the floor of the House of Delegates on August 11, 1982, to change the definition of "Counsel" to that contained in the ABA Model Rules of Disciplinary Enforcement (*i.e.*, substitution of federal district court bar member as counsel, if state bar counsel declined to serve). Other objections to the Franck Proposal (*e.g.*, attorneys could still be required to enforce substantive agency policies; reluctance of the district court for the District of Columbia to promulgate the standards; subjecting an attorney to conflicting standards; no authoritiative source to monitor the standards; lack of uniformity of enforcement because of prosecutorial discretion that would exist with state bar counsels, and the complexity of the "Rules for Federal Agency Discipline") might have been overcome by Congressional action. However, their presence reinforced the inclination of the House of Delegates to adopt a strong, state-oriented position on discipline of attorneys practicing before federal agencies, *i.e.*, the Waxman/Forrest Proposal. *See* note 206, *infra*.

[205] *See* notes 10 and 12, *supra*.

[206] Discussion of the Franck and Waxman/Forrest Proposals (items 119A and 123, respectively, on the ABA House of Delegates Final Calendar) began shortly before 5 p.m. on August 11,

Both of these proposals represent the work product of persons who have studied and considered in detail the issues involved in discipline of attorneys practicing before federal agencies. Each adds to the resolution of who should discipline attorneys. The proposals agree in one major aspect: Except for misconduct relating to maintaining order in (or the integrity of[207]) a specific agency proceeding, authority to discipline attorneys for misconduct before federal agencies should be removed from the agencies. The proposal adopted by the House of Delegates as policy of the ABA and which is set out, *supra*, would except the Treasury Department and the Patent and Trademark Office (which have express authority[208]) from this proscription; the other proposal does not. The primary reason for removing attorney discipline from substantive agencies has already been discussed, *i.e.*, "the potential corruption of justice when an administrative agency with significant prosecutorial responsibilities has the power to sanction an adversary representing and advising a client."[209] The practical reason for exempting Treasury and the Patent and Trademark Office is that they apparently are doing a good job and have the support of the attorneys who

---

1982, the final day of the meeting of the House. The Franck Proposal, *i.e.*, the recommendation of the ABA Standing Committee on Professional Discipline, was presented and briefly explained. As the person presenting the Waxman/Forrest Proposal began to speak, a member of the House of Delegates rose, was recognized by the Chair, and made what appeared to be an "important" inquiry to him: What was the hour? The Chair indicated that the time was 5:07, give or take a few minutes. The implication of the question and the response of the House of Delegates was clear—The hour *was* late and the Calendar needed to be completed. The explanation of the Waxman/Forrest Proposal was kept short and to the point: simplicity and states rights, *i.e.*, take the authority to discipline attorneys away from federal agencies and give the responsibility to the states where the function belonged. The response of the House of Delegates—a body composed of representatives of state bars—was predictable, applause. At this point, the House of Delegates appeared to be ready without further discussion to vote on whether the Waxman/Forrest Proposal should be adopted as a substitute for the Franck Proposal momentarily before the Chair called for a vote, further comments were made by supporters of the two proposals. The proponents of the Franck Proposal reiterated points made when the proposal was introduced, *e.g.*: (1) the Congress would not enact legislation which eliminates federal government jurisdiction to discipline attorneys practicing before federal agencies; (2) since attorneys are already subject to different professional guidelines because the states (as well as the federal courts) do not have the same standards, uniform federal standards of conduct to govern attorneys practicing before federal agencies would not be revolutionary, but appropriate to eliminate the possibility of attorneys (from different states) practicing before federal agencies being subject to different standards. Other volleys were exchanged relating to, *e.g.*, the unwillingness of the United States District Court for the District of Columbia to promulgate uniform standards (a feature of the Franck Proposal) [*see* note 170, *supra*]; the ineffectiveness of the states in processing complaints of attorney misconduct before federal agencies; and the danger of state agencies adopting standards similar to that announced by the SEC in *Carter and Johnson* (*see* note 120, *supra*). Shortly before 5:30 p.m., the Waxman/Forrest Proposal [quoted in text, *supra* note 203] was adopted as a substitute for the Franck Proposal. Within a few minutes thereafter the Calendar was completed and the House of Delegates adjourned.

[207] *See* note 11, *supra*.

[208] At least one other agency has express authority; *see* note 134, *supra*.

[209] Note 126, *supra*. For discussion of the implications of not separating the functions, *see* notes 36 *et seq.*, *supra* and accompanying text, as well as the reports accompanying the Franck Proposal (*supra* note 7) and the Waxman/Forrest proposal (*supra* note 8).

practice before them;[210] in addition, the Congress has expressly granted these agencies the authority and without a compelling reason, one can argue that the delegations should not be disturbed.[211]

The same types of concerns as were considered with regard to who in the federal government should promulgate standards are involved in who should discipline attorneys practicing before federal agencies. The conclusion, one can also argue, should be similar, *i.e.*, remove from the agencies as a general principle, except for those with express authority, the authority to discipline attorneys.[212]

---

[210] *See* note 50, *supra*.

[211] *See* notes 47 and 48, *supra*.

[212] Responses to the Federal Questionnaire (*see* notes 16 and 89, *supra* and Appendix A, *infra*) relating to attorney discipline were revealing. The two agencies with express authority that responded (*i.e.*, the Dept. of Treasury and the Patent and Trademark Office) both opposed a centralized authority to process attorney cases (QUESTION THIRTEEN). In fact, only two Federal Questionnaires sent to general counsels (*i.e.*, to the ICC and the MSPB) and two Federal Questionnaires sent to chief administrative law judges (*i.e.*, to the ICC and FDA) indicated approval of establishment of a centralized disciplinary authority. The remaining agencies opposed establishment. Of interest, however, is of those submitting negative responses, only two agencies besides Treasury and Patent and Trademark indicated more than two instances of attorney misconduct annually (QUESTION NINETEEN). Those agencies were the SEC in the Federal Questionnaire submitted by the chief administrative law judge and the Department of Health & Human Services in the response submitted by its general counsel. The Federal Questionnaire sent to the SEC general counsel was not returned. Because of the position of the SEC (*see* note 202, *supra*) and its officials (*see* note 201, *supra*), the position of the SEC would seem to be not to oppose a centralized disciplinary authority, but rather to support its establishment, provided the mechanism were effective. Although insignificant attorney misconduct in response to QUESTION NINETEEN. The affirmative response of the ICC, not only to a centralized disciplinary authority, but also to uniform standards (QUESTION EIGHT), in the Federal Questionnaires sent to the general counsel and the chief administrative law judge is noteworthy. The Commission has a long history, as does the SEC, with regard to standards of conduct and attorney discipline. For example, in 1930, a code of ethics was adopted by the practitioners before the ICC and this Code (in its current form) has been adopted by the Commission as part of its rules governing practice. *See* 49 C.F.R. § 1100.11, incorporating Appendix A: Code of Ethics for Practitioners before the Interstate Commerce Commission. [Under a proposed revision and redesignation of the ICC Rules of Practice, Appendix A would become 49 C.F.R. §§ 1103.10-1103.35; see Ex Parte. No. 55 (Sub-No. 55), Interstate Commerce Commission, a copy of which can be obtained at Room 2209, Office of the Secretary, Interestate Commerce Commission, Washington, D.C. 20423.] *See* "Code of Ethics of Practitioners Before the ICC," 17 A.B.A.J. 73-74 (1931). The Acting Director, Office of Compliance and Consumer Assistance (who responded to the Federal Questionnaire sent to the ICC General Counsel) stated: "This office favors the creation of a centralized authority to handle attorney disciplinary matters. Ideally, such an office could process discipline cases more efficiently than the individual agency. It is our feeling that discipline cases demand an inordinate amount of the agency's enforcement effort." Letter to author from Bernard Gaillard (Jun. 9, 1982), a copy of which is on file with the Administrative Conference of the United States. A similar conclusion was reached by the SEC. *See* note 202, *supra*. Of the agencies responding, therefore, the absolute numbers overwhelmingly do not favor the establishment of a centralized disciplinary authority; however, when the position of the agencies with appreciable attorney discipline cases is considered, only Treasury, Patent and Trademark, and Health & Human Services have extensive experience and oppose. The SEC and the ICC, the other two agencies with a documented record of experience, do not oppose. As between four of these agencies, at least two distinguishing factors are present. Treasury and Patent and Trademark have express authority; SEC

An issue on which the two proposals presented to the 1982 ABA House of Delegates differed substantially is who should undertake the disciplinary responsibility if this function is removed from the agencies. The proposal adopted by the House of Delegates would use the states; the other proposal recommended utilizing an appropriate federal district court (with the prosecution handled by the bar counsel of the attorney's licensing state). Who is correct, or does a middle ground exist? One of the basic considerations in 1980 when a concerted effort was begun by the ABA to seek a resolution of the issues here under discussion was, "The extent to which state disciplinary agencies lack adequate staff and financial resources to serve as the principal vehicles for administering discipline over federal agency practitioners."[213] The extent is still unknown. As a consequence, until the states, in general, can demonstrate the resources and interest required to assume effectively the responsibilities associated with discipline of attorneys practicing before federal agencies,[214] a recommendation to transfer this function to the states not only would seem premature, but would have little likelihood of receiving Congressional approval.[215] The responsibility of disciplining attorneys practicing before federal agencies should remain, therefore, at least for the forseeable future, in the federal government. The question is, of course, where?

If one eliminates the agencies themselves as adjudicators, the choices seem to be two: a neutral body or the federal judiciary. Creation of a centralized authority would not seem realistic because of the cost involved. Use of the Office of Government Ethics for this function would not seem appropriate, as adjudi-

---

and the ICC do not. Second, the attorneys practicing before the former do not appear to be dissatisfied with the current procedures of the agencies (note 50, *supra*), while some evidence of discontent does exist with regard to the latter (*see* note 10, *supra*). As a consequence, except for those agencies that have express authority to discipline attorneys, opposition to the concept of centralizing attorney discipline appears to come from agencies (except for Health & Human Services) that do not have significant experience with the problem at least insofar as the views of the officials responding to the Federal Questionnaire are reflective of the agencies' position.

[213] *See* note 25, *supra*.

[214] *See* notes 23, 24, and 28, *supra*.

[215] This was the conclusion of the proponents of the Franck Proposal (*supra* note 7) which was not adopted by the ABA House of Delegates on August 11, 1982. *See* note 206, *supra*. In addition, the public might misperceive such an action: "I agree . . . that it would be inadvisable for the bar to seek legislation preventing agencies from instituting disciplinary rules. . . . At this time when voices are increasingly heard criticizing the bar's alleged self-protective posture, legislation which would prevent agencies from taking any steps toward disciplining wayward attorneys would be the wrong proposal at the wrong time." Letter to John S. Nolan from Myron C. Baum (Mar. 22, 1982), a copy of which is on file with the Administrative Conference of the United States.

[216] *E.g.*, with regard to the federal courts: "In summary, total reliance on a state's disciplinary judgments is not permissible, and the federal courts require a disciplinary structure to deal with misconduct violative of federal court standards which are not dealt with by a state system. Further, a demonstration of federal judicial concern can serve as a point of leadership and example in response to the current professional and lay concern with professional standards." Agata, *Admissions and Discipline of Attorneys in Federal District Courts: A Study and Proposed Rules*, 3 Hofstra L. Rev. 249, 284 (1975).

cating cases of this nature are not within its current responsibilities and, thus, would involve a different emphasis from that assumed at present. Others besides the ABA Standing Committee on Professional Discipline have thought the federal courts an appropriate forum for disposition of misconduct by attorneys at the federal level.[216] Dean Thomas D. Morgan,[217] for example, has stated:

> In my view, the forum for trial of these matters should be the United States District Court for the District of Columbia, with appeal to the United States Court of Appeals for the D.C. Circuit.
>
> The disbarment or other discipline of lawyers has traditionally been perceived as a judicial function and worthy of this kind of high-level attention. Given the fact that I believe that the number of these cases would be small and that most of the reciprocal disbarment cases would be straight forward, I do not believe that this would be a significant burden on the Federal courts[218] nor a significant burden on the attorney from Montana who was forced to have his or her conduct reviewed in Washington.[219]

In fact, a twenty-seven page legislative proposal and commentary was circulated in 1981 by the General Counsel and the Solicitor of the SEC which would have placed the responsibility for disciplining attorneys for misconduct before federal agencies with the federal district courts.[220] Many features of this proposal are instructive, *e.g.*:

1. The complaining agency should be the initiating body for charges of attorney misconduct which would be filed with the appropriate United States district court "under seal"; the charges (and accompanying documents) would be examined *in camera* to determine whether to continue the proceeding. If the proceeding was terminated, the charges (and accompanying documents) would remain nonpublic. If the court were to find that the charges warranted further action, the charges would become public and the proceeding would continue.[221]

2. Venue with regard to adjudication of attorney misconduct before federal agencies would lie, "where the agency has its principal office . . .; where the conduct occurred . . .; where the lawyer maintains an office . . .; where the conduct occurred . . .; or where the lawyer is licensed to practice law." The initial choice of where to file would be made by the complaining agency, but opportunity for change of venue by the attorney would be provided.[222]

---

[217] Dean, Emory University School of Law and co-author of T. Morgan & R. Rotunda, Problems and Materials in Professional Responsibility (2d ed. 1981).

[218] The General Counsel and Solicitor of the SEC also concur that the "economic impact" on the federal judiciary should not be significant: "Presumably, the impact of this additional jurisdiction in the federal courts would be so slight as to not warrant funding." *See* Ferrara/Gonson Proposal, *supra* note 201, at 5.

[219] Letter to Margery H. Waxman from Thomas D. Morgan (Feb. 9, 1982), a copy of which is on file with the Administrative Conference of the United Statets.

[220] *See* Ferrara/Gonson Proposal, *supra* note 201.

[221] *Id.* at 6.

[222] *Id.* at 6 and 7.

3. Authority of agencies to discipline attorneys would not be withdrawn until two years after the effective date of the legislation placing jurisdiction in the United States district courts, *i.e.*, concurrent jurisdiction would exist for two years.[223]

The first suggestion, *i.e.*, use of agency personnel to initiate charges (and presumably to present the case in chief to the court if the proceeding were continued) is subject to an obvious objection: Would not this permit the complaining agency to become privy to information protected by the attorney/client privilege if the attorney were to reveal in her/his defense confidential communications with a client?[224] Although this may be a theoretical concern, a federal district judge should have sufficient tools at hand to prevent improper communication of this information to the complaining agency, *e.g.*, issuance of a protective order or receipt of the testimony *in camera*. If agency personnel were not used for this function, a ''special prosecutor'' would most likely have to be appointed or a permanent office established. The financial costs of this alternative would not seem to be justified until such time as abuse by agency personnel performing the function of presenting evidence of alleged attorney misconduct cannot be prevented by the court.[225] By requiring the charges to be delivered ''under seal'' and by not permitting them to become public until a neutral third party—a federal district judge—has determined that the charges (and accompanying documents) warrant further action, one can eliminate an alleged deficiency in the current practices of some agencies, *i.e.*, ''to institute a public proceeding first and to investigate later.''[226]

A flexible venue provision, such as that suggested, seems preferable to a more restricted provision, because of the difficulty of predicting which situs will be most convenient for the parties under particular circumstance.[227] For example, a case might involve an attorney who is licensed in Oregon, who maintains her/his principal office or residence in Miami (perhaps a law professor or a retired attorney), and who is charged with misconduct before the SEC regional office in Fort Worth. Which forum should be selected? Oregon? Florida? Texas? The District of Columbia? Without more facts the choice cannot necessarily be made with any guarantee or certainty as to which is the best selection. Although the hypothetical facts just described most likely would never occur, a restricted venue provision which would limit the situs of a trial to the place of licensing, the place where the alleged misconduct occurred, the place of an attorney's principal office, or the like would not provide the flexibility that seems desirable for adjudications of misconduct by attorneys who may be licensed anywhere in the United States and which may involve facts arising in many diverse jurisdictions.

---

[223] *Id.* at 10.

[224] *See* Code of Professional Responsibility, Disciplinary Rule 4-101(c)(4): ''A lawyer may reveal . . . confidences or secrets necessary to . . . defend himself . . . against an accusation of wrongful conduct.''

[225] If the professional standards approved by the Office of Personnel Management were applicable not only to practitioners, but also government attorneys (*see* notes 184-189, *supra* and accompanying text) and if government attorneys were subject to federal district court jurisdiction for violation of the standards, use of agency personnel might be inappropriate. Under this set of circumstances, a non-agency person should be available, not only to initiate the charges and present the case in chief to the court, but also with whom to lodge a complaint in the first place. *See* note 180, *supra* and note 235, *infra*.

[226] *See* note 17, *supra* and Franck Proposal, *supra* note 7, at 28 [Rule 15: Public Hearings—Confidentiality].

[227] In addition to the limited venue suggested by Dean Morgan (note 219, *supra*), see also Franck Proposal, *supra* note 7, at 7 [Rule 2(c) would place the venue of the federal district court ''in a state in which the practitioner is licensed to practice, unless no significant element of alleged misconduct occurred in that state in which case the action shall be brought in the court for the district in which the practitioner maintains his principal office for agency practice.''].

The overlap period of two years before expressly withdrawing the authority of federal agencies to discipline attorneys (except of course to the extent that express authority otherwise provides) seems advisable. A period of adjustment would permit an effective system (standards, as well as the new disciplinary mechanism) to be in place before extinguishing the present system, thus, avoiding the creation of a power vacuum with regard to attorney discipline.

Other conceptual details should also be considered. For example, what types of attorney discipline, if any, should not be adjudicated in federal district court? One can argue that authority to discipline in a case in which the sanction imposed only affects an attorney's eligibility to practice before the complaining agency for the duration of the proceeding out of which the misconduct arose, should remain with the agency. An administrative law judge, therefore, could continue to exclude an attorney from a hearing because of contumacious behavior or the agency could suspend an attorney for the remainder of a proceeding because the attorney filed a false affidavit. These types of misconduct (*i.e.*, those involving order in, or integrity of, a proceeding) whose sanction does not extend beyond the immediate proceeding should not be adjudicated by federal district courts. The misconduct can be handled expeditiously by the agency and would not seem to warrant judicial participation.[228] The standards of conduct relating to these

---

[228] The Franck Proposal, *supra* note 7, at 10 [Rule 3], as well as the Waxman/Forrest Proposal, *supra* note 8, at 7, reached the conclusion that a limited category of misconduct should be handled by the agencies. *See, e.g.*, the Commentary to Rule 3:

> It has long been recognized that a judicial officer has the power to maintain decorum and order in the proceedings before him. . . . This power includes the right to remove summarily anyone who willfully obstructs the course of judicial proceedings. . . .
>
> The power to suspend from practice is not needed in order to maintain control and supervision over the hearing room. To allow the agency itself to suspend practitioners for conduct the agency considers contemptuous (otaher [sic] than by excluding them from the hearing room in a particular proceeding when necessary to maintain order) carries too great a danger that the conscientious practitioner may be deterred from zealous representation of the client before the agency. Only a court with disciplinary jurisdiction may impose discipline *permanently* affecting the right to practice.
>
> If a practitioner is determined to be willfully obstructing the course of a proceeding, the hearing officer may correct the abuse by the imposition of sanctions which do not deprive the practitioner of the right to practice law generally. In such circumstances, the agency should

types of conduct, however, should still be subject to approval of the Office of Personnel Management.[229] Some misconduct of this nature (*e.g.*, contumacious conduct during a hearing) may, of course, be so serious as to warrant a sanction extending beyond the immediate proceeding;[230] if the agency concludes the facts warrant discipline of this nature, charges should be filed with the appropriate federal district court.

A second type of misconduct proceeding for which an argument can be made not to use federal district courts involves a summary proceeding held for the purpose of determining whether reciprocity should be given to the discipline imposed by another authority (*e.g.*, a licensing state, a federal court, or another federal agency). Reciprocity hearings would not seem to involve the same separation-of-function problems as do adjudications of original misconduct.[231] The agency adjudicator has not been "personally offended" and the adjudication is limited to the question of whether reciprocity should be granted.[232] In addition, an agency is perhaps better informed than a federal district judge to make a decision as to whether an attorney disciplined elsewhere should be similarly disciplined by the agency. As a consequence, little reason would seem to exist to consume valuable, judicial resources for reciprocity hearings.

With regard to whether a sanction imposed by one agency should automatically be applied by all federal agencies, the responses to the Federal Questionnaire[233] were mixed, at best, although a substantial number of agencies did favor reciprocity. Recognition of another agency's disciplinary action should not, however, be automatic; an agency should conduct a "show-cause" hearing prior to giving reciprocity, which satisfies constitutional requirements.[234]

With respect to the mechanism to enforce standards of conduct for attorneys practicing before federal agencies, the Agency Practice Act (5 U.S.C. § 500) should be amended[235] to provide that (except as otherwise expressly authorized

---

> immediately inform counsel of the nature of the practitioner's misconduct for initiation of appropriate disciplinary action. (Emphasis added.)

Franck Proposal, *supra* note 7, at 10. *See* note 193, *supra* for text of Rule 3. The Waxman/Forrest Proposal, *supra* note 8, at 7 and note 203, *infra* would "restrict the agency's disciplinary authority to the minimum compatible with the need of maintaining the order and integrity of its proceedings. For the latter purpose, it may disqualify the attorney from the particular case or matter; but to impose broader sanctions it must proceed before a disciplinary board in a state where the attorney is licensed to practice."

[229] *See* note 195, *supra*.

[230] *See, e.g.*, Camp v. Herzog, 104 F. Supp. 134 (D.D.C. 1952).

[231] *See* notes 36 to 51, *supra* and accompanying text.

[232] For the type of factors to be considered in a reciprocity hearing, *see* note 109, *supra*.

[233] *See* notes 16 and 89, *supra* and Appendix A.

[234] *See* note 112, *supra*.

[235] The Agency Practice Act (5 U.S.C. § 500) should be amended as follows—

1. 5 U.S.C. § 500 (d)(2) should be changed to read: "This section does not—****(2) prevent an agency from requiring a power of attorney as a condition to the release of information the disclosure of which is restricted by law*; or." This amendment would repeal 5 U.S.C. § 500(d)(2) as currently enacted; for current text of this paragraph, *see* note 59, *supra*. *See also* note 87, *supra*.

by the Congress), no federal agency has authority to impose discipline on attorneys who practice before the agency except: (1) with regard to reciprocity hearings to determine whether a sanction imposed by another authority should be applied to the attorney by the agency, and (2) with regard to imposition of

---

2. 5 U.S.C. § 500(f) should be redesignated as 5 U.S.C. § 500(g) and the following language enacted as 5 U.S.C. § 500(f):

"(1) Except as provided by this subsection, no agency shall be authorized, two years after the effective date of this subsection, to adopt standards of conduct for persons qualified by subsection (b) or to impose discipline thereon for violation of any such standards:

(A) No agency shall promulgate standards of conduct for persons qualified by subsection (b) except as provided by [*5 U.S.C. App. I, §§ 401 et seq.*] *and by the regulations adopted by the Office of Personnel Management in implementation thereof;*

(B) An agency may discipline a person qualified by subsection (b) for conduct proscribed by the standards adopted pursuant to paragraph (A), above, to the extent required to maintain order in or the integrity of a proceeding, provided the discipline imposed by the agency does not continue past the duration of the proceeding;

(C) An agency may conduct reciprocity proceedings as provided in subsection (b), above; and

(D) Nothing in this subsection affects the authority of a State to regulate an individual described in subsection (b), above, or of an agency which has express, statutory authority (or which may be granted express, statutory authority) to adopt standards of conduct for persons qualified by subsection (b), above, and to impose discipline thereon for violation of standards adopted under the agency's express, statutory authority.

(2) In all other instances, the district courts of the United States have jurisdiction to impose discipline on persons qualified under subsection (b), above, for conduct proscribed by standards adopted pursuant to paragraph 1(A), above:

(A) Allegations of proscribed conduct (with accompanying documents) committed by a person qualified under subsection (b), above, shall be presented by the agency to the court under seal; the court shall determine in camera whether substantial evidence of proscribed conduct has been presented by the agency so as to warrant continuation of the proceeding. If the proceeding is not continued, the allegations (and accompanying documents) shall remain non-public and the proceeding shall be terminated. If the court determines that substantial evidence of proscribed conduct exists, the proceeding shall be continued according to rules prescribed by the court. The burden shall be on the agency to sustain the allegation of proscribed conduct. If the court finds clear and convincing evidence has been presented that proscribed conduct has occurred, the court shall disbar, suspend, place on probation, or reprimand the person who has committed the proscribed conduct and may assess against the person who committed proscribed conduct the costs of the proceedings, as well as order restitution to persons financially injured by the proscribed conduct, or both.

(B) The action may be brought in the district court of the United States in which the agency has its principal office; in which the conduct occurred; in which the person qualified by subsection (b), above, maintains an office; in which the person qualified by subsection (b), above, resides; or in which the person qualified by subsection (b), above, is licensed to practice law. The court shall give consideration to a request by the person against whom an action is filed for a change of venue. Review of discipline imposed by a federal district court under this subsection shall be in the United States Court of Appeals."

discipline necessary to maintain order in, or the integrity of, a proceeding, the sanction for which does not extend beyond the duration of the proceeding. In all other instances, the agency would be required to file charges (and supporting documents) of alleged attorney misconduct with the appropriate federal district court and be prepared, if the court determines further proceedings are warranted, to present the case in chief. Although uniform procedures for adjudicating attorney misconduct before federal agencies might be desirable, the simpler course is to permit the federal district courts to adopt appropriate procedures.[236] In no case, however, should a disciplinary action, except for reciprocity hearings, be initiated or descipline imposed except for a violation of the standards of conduct approved by the Office of Personnel Management.[237] The disciplinary mechanism recommended could be applied, of course, not only to attorneys,[238] but also to non-attorneys practicing before federal agencies.[239]

A final matter to be considered is how to increase the exchange of information between federal agencies with regard to discipline of attorneys. At present federal agencies do not appear to communicate the imposition of discipline against an attorney to other agencies.[240] If a federal registry of attorneys existed,

---

[NOTE: If the standards of conduct adopted pursuant to § 500 (f)(1)(A), *supra*, are to apply not only to practitioners but also to government attorneys (*see* notes 184–189, *supra* and accompanying text and note 225, *supra*), additional language should be added to 5 U.S.C. § 500 (f)(2)(A), *supra*: ''*If the person alleged to have committed proscribed conduct is an employee or member of an agency, the complaint shall be made to the Director, Office of Government Ethics (or his designate) who shall assume the responsibility of presenting the allegation of proscribed conduct (and accompanying documents) to the court and if the proceeding is not terminated by the court, of presenting the case in chief.*'' Such a provision would also require amendment of Title IV, Ethics in Government Act, 5 U.S.C. App. I, §§ 401 *et seq. See* note 180, *supra*. With regard to the language suggested for 5 U.S.C. § 500(f)(2)(A), the administrative law standard of ''substantial evidence'' was thought more appropriate for the preliminary evaluation of the evidence of proscribed conduct than the criminal law standard of ''probable cause to believe that an offense has been committed'' applicable to preliminary examinations [*see* Fed. Rules of Crim. Pro. Rule 5.1(a)]. ''Clear and convincing evidence'' is the standard most frequently applied in attorney disciplinary proceedings to determine whether proscribed conduct has been committed. 7A C.J.S. Attorney & Client § 103 (1980).

[236] Federal district courts currently promulgate procedures relating to adjudicating attorney misconduct arising before the courts. Some federal district courts have adopted the 1978 ABA Model Federal Rules of Disciplinary Enforcement, others have not. In addition, the Franck Proposal, *supra* note 7, makes valuable recommendations as to appropriate procedures. As a consequence, recommendation of a particular procedure, or that the federal district courts adopt uniform procedures for this single category of adjudication, seems unnecessary and would lessen the likelihood of judicial support for the overall recommendations made in this presentation.

[237] *See* note 180, *supra*.

[238] *See* note 225, *supra*.

[239] *See* note 4, *supra*.

[240] A similar problem was recognized in 1973 in the Clark Report with regard to exchange of information between disciplinary authorities: ''Problem 29. No procedures for notifying disciplinary agencies when attorneys admitted to practice in their jurisdiction are disciplined elsewhere.'' The Clark Committee's recommendation resulted in the establishment of the National Discipline Data Bank, ''to which every court and administrative agency should report all formal discipline imposed against attorneys for dissemination to every disciplinary agency within the United States.'' ABA Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement 156, 158 (Final Draft/June 1970). Although the National Dis-

the listing could be used to facilitate the exchange of information; however, its creation appears unlikely at this time.[241] How can this information be distributed efficiently, if no record exists as to which agencies before which a disciplined attorney practices? A reasonable, cost-efficient method[242] would seem to be to designate a central clearinghouse in the federal government to whom all federal agencies would send information about discipline imposed on attorneys as the result of misconduct before their agency—whether the discipline was imposed by an agency proceeding (reciprocal or otherwise) or by a decision of a federal district court. This information (*e.g.*, name, identifying particular, the complaining agency, and the like) would be compiled on a periodic basis (monthly, quarterly, or whatever experience suggested) by the central clearinghouse and published on a regular basis in the Federal Register. If publication in the Federal Register were effected, in fact, on a regular basis (to include a negative report if no disciplinary actions existed for a particular reporting period), one would hope that agency personnel and administrative law judges would seek out the entry in the Federal Register on the appropriate day (*e.g.*, first issue of each quarter). In this way, information about disciplinary actions involving misconduct arising out of practice before federal agencies would be readily available to those who had an interest.

A remaining matter to be resolved, of course, is who should be the clearinghouse? As with other recommendations, creation of a special entity to perform the function does not appear to be financially justified; however, assigning the function to the Office of Government Ethics[243] should not require substantial, if any, increase in that Office's appropriation because of the relatively small number of attorney disciplinary actions, on a government-wide basis, that appear to be initiated.[244]

Conclusions and Recommendations

The three aspects of regulation of attorneys practicing before federal agencies—admission requirements, standards of conduct, and disciplinary action—as well as the authority of the federal government (and, in particular, of the Congress and federal agencies) to exercise authority over attorneys in the federal

---

cipline Data Bank is in operation, information regarding discipline imposed as a result of misconduct before federal agencies does not appear to be readily available to federal agencies.

[241] *See* notes 114–18, *supra* and accompanying text.

[242] Publication of a separate document, *e.g.*, "Report of Federal Agency Discipline," on a government-wide basis does not seem to be financially justifiable. However, such a report is published by at least one agency for that agency's purpose. *See* "Quarterly Report of Disciplinary and Related Actions (Doc. No. 5528)" published by the Office of the Director of Practice, Department of the Treasury.

[243] Title IV, Ethics in Government Act, 5 U.S.C. App. I, §§ 401 *et seq.* should be amended to provide that all federal agencies are to forward to the Director, Office of Government Ethics (or his designate) information relating to imposition of discipline on attorneys arising out of misconduct before the agencies (whether the discipline is judicially or administratively imposed); that the Director, Office of Government Ethics shall determine the nature of the information to be reported; and that the Director, Office of Government Ethics shall cause to be published in the Federal Register on a periodical basis the information.

[244] *See* notes 28, 163–66, *supra* and accompanying text; note 212, *supra*; and Appendix B.

administrative process have been considered and discussed in detail. Long standing, consistent precedent, both congressional and judicial, support the conclusion that the Congress has the power to regulate attorneys practicing before federal agencies. In exercising this authority, the Congress has set a single admission requirement for practice before federal agencies, save only for practice before the Patent and Trademark Office.[245] The other two aspects of regulation of attorneys—standards and discipline—have not, however, been as clearly defined by the Congress. Because the Congress in 1965 did not cover in detail attorney discipline[246] (which of necessity presupposes the existence of applicable standards) when admission requirements were addressed,[247] the authority of federal agencies without express authority to promulgate standards and to impose discipline remains unsettled and a matter of concern to the bar and federal agencies alike.[248] Although extensive misconduct by attorneys before federal agencies has not been documented to date (except with respect to a few agencies and only then to varying degrees[249]), the lack of clarity in the Agency Practice Act with regard to the extent and nature of agency authority to define standards of conduct for attorneys who practice before federal agencies and to impose discipline for violation of the standards should not continue. Until the Congress expressly defines agency responsibilities relating to standards of conduct and discipline, the controversy between the bar and federal agencies on these matters is unlikely to disappear.

The following recommendations, therefore, suggest precise statutory language in some instances and describe general statutory schemes in others to effect amendments in the Agency Practice Act (5 U.S.C. § 500) and in Title IV of the Ethics in Government Act (5 U.S.C. App. I, §§ 401 *et seq.*). The recommendations not only represent an appreciation and balancing of the interests and concerns of attorneys and of the federal agencies, but also reflect a regard for the public's right to expect (and to demand) an effective regulation of attorneys practicing in the federal administrative process.

The Recommendations are:

1. That 5 U.S.C. § 500(b) be amended to read:

> ''An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts. *Notwithstanding, an agency which receives notice*

---

[245] *See* the Agency Practice Act of 1965, 5 U.S.C. § 500 (1976), and in particular, § 500(b), (e).

[246] Agency Practice Act of 1965 addresses agency discipline only in general terms: ''This section does not—. . . (2) authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency.'' 5 U.S.C. § 500(d)(2) (1976). *See* notes 87 and 235, *supra*.

[247] *See* note 68, *supra*.

[248] *See* notes 131 *et seq.*, *supra* and accompanying text and notes 210 *et seq.*, *supra* and accompanying text.

[249] *See* notes 28, 163–66, *supra* and accompanying text; note 212, *supra*; and Appendix B.

> *that a State license by virtue of which an individual is (or could have been) qualified under this subsection to represent persons before the agency (or that such an individual's qualification to represent persons before a federal court or before another agency) has been suspended, enjoined, restrained, revoked, or otherwise restricted by the State, federal court, or other agency may require the individual to show cause within forty days why he should not be similarly suspended, enjoined, restrained, disbarred, or otherwise restricted in representing persons before the agency; the agency may suspend temporarily the right of the individual to represent persons before the agency unless and until he shall show cause.*''[250]

2. That 5 U.S.C. § 500(d)(2) be amended to read:

> ''This section does not—*** (2) *prevent an agency from requiring a power of attorney as a condition to the release of information the disclosure of which is restricted by law*; or''

This Recommendation would repeal 5 U.S.C. § 500(d)(2) as currently enacted.[251]

3. That 5 U.S.C. § 500(f) be redesignated as 5 U.S.C. § 500(g) and that the following be enacted as 5 U.S.C. § 500(f):

> *''(1) Except as provided by this subsection, no agency shall be authorized, two years after the effective date of this subsection, to adopt standards of conduct for persons qualified by subsection (b) or to impose discipline thereon for violation of any such standards:*
>
> > *(A) No agency shall promulgate standards of conduct for persons qualified by subsection (b) except as provided by* [*5 U.S.C. App. I, §§ 401 et seq.*] *and by the regulations adopted by the Office of Personnel Management in implementation thereof;*
> >
> > *(B) An agency may discipline a person qualified by subsection (b) for conduct proscribed by the standards adopted pursuant to paragraph (A), above, to the extent required to maintain order in or the integrity of a proceeding, provided the discipline imposed by the agency does not continue past the duration of the proceeding;*
> >
> > *(C) An agency may conduct reciprocity proceedings as provided in subsection (b), above; and*
> >
> > *(D) Nothing in this subsection affects the authority of a State to regulate an individual described in subsection (b), above, or of an agency which has express, statutory authority (or which may be granted express, statutory authority) to adopt standards of conduct for persons qualified by subsection (b), above, and to impose discipline thereon for violation of standards adopted under the agency's express, statutory authority.*
>
> *(2) In all other instances, the district courts of the United States have jurisdiction to impose discipline on persons qualified under subsection (b), above, for conduct proscribed by standards adopted pursuant to paragraph 1(A), above:*

---

[250] *See* note 112, *supra* and preceding text.

[251] *See* note 87, *supra* and preceding text, and note 235, *supra*.

> *(A) Allegations of proscribed conduct (with accompanying documents) committed by a person qualified under subsection (b), above, shall be presented by an agency to the court under seal; the court shall determine in camera whether substantial evidence of proscribed conduct has been presented by the agency so as to warrant continuation of the proceeding. If the proceeding is not continued, the allegations (and accompanying documents) shall remain non-public and the proceedings shall be terminated. If the court determines that substantial evidence of proscribed conduct exists, the proceeding shall be continued according to rules prescribed by the court. The burden shall be on the agency to sustain the allegation of proscribed conduct. If the court finds clear and convincing evidence has been presented that proscribed conduct has occurred, the court shall disbar, suspend, place on probation, or reprimand the person who has committed the proscribed conduct and may assess against the person who committed proscribed conduct the costs of the proceedings, as well as order restitution to persons financially injured by the proscribed conduct, or both.*
>
> *(B) The action may be brought in the district court of the United States in which the agency has its principal office; in which the conduct occurred; in which the person qualified by subsection (b), above, maintains an office; in which the person qualified by subsection (b), above, resides; or in which the person qualified by subsection (b), above, is licensed to practice law. The court shall give consideration to a request by the person against whom an action is filed for a change of venue. Review of discipline imposed by a federal district court under this subsection shall be in the United States Court of Appeals.''*

[NOTE: If the standards of conduct adopted pursuant to § 500 (f)(1)(A), above, are to apply not only to practitioners but also to government attorneys, additional language should be added to 5 U.S.C. § 500(f)(2)(A): ''*If the person alleged to have committed proscribed conduct is an employee or member of an agency, the complaint shall be made to the Director, Office of Government Ethics (or his designate) who shall assume the responsibility of presenting the allegation of proscribed conduct (and accompanying documents) to the court and if the proceeding is not terminated by the court, of presenting the case in chief.*'' See Recommendation 4, below.][252]

4. That the Agency Practice Act (5 U.S.C. § 500) [See Recommendation 3, above] and Title IV of the Ethics in Government Act (5 U.S.C. App. I. §§ 401 *et seq.*) be amended to assign the responsibility for developing, promulgating, and monitoring uniform standards of conduct for attorneys practicing before all federal agencies [except to the extent the Congress has expressly provided otherwise] to the Director, Office of Government Ethics, by legislation similar in nature to Title IV of the Ethics in Government Act of 1978, as amended (*see* 5 U.S.C. App. I §§ 402, 403, 404); that the Congress make appropriations to the Office of Personnel Management adequate to implement this responsibility;

---

[252] *See* note 235, *supra* and preceding text.

and that the Congress amend 5 U.S.C. App. I § 405, as required. The standards promulgated should be published in the Code of Federal Regulations under the same ''Part Number'' and should be uniform except to the extent that additional standards are required by the functions and activities of a particular agency, any such additional standards to be approved by the Office of Personnel Management prior to publication and becoming effective (*see, e.g.*, 5 C.F.R. § 735.104). [NOTE: If the standards of conduct adopted pursuant to this Recommendation are to apply not only to practitioners, but also to government attorneys, the responsibilities of receiving complaints of proscribed conduct by an employee or member of an agency; of presenting allegations of that proscribed conduct (and accompanying documents) to a federal district court; and, if the judicial proceeding is not terminated by the court, of presenting the case in chief should be assigned to the Director, Office of Government Ethics (or his designate) by amendment of 5 U.S.C. App. I §§ 402, 403, 404. *See* Recommendation 3, above.][253]

5. That Title IV, Ethics in Government Act, 5 U.S.C. App. I, §§ 401 *et seq*. be amended to provide that all federal agencies shall forward to the Director, Office of Government Ethics (or his designate) information relating to imposition of discipline of attorneys arising out of misconduct before the agencies (whether the discipline is judicially or administratively imposed); that the Director, Office of Government Ethics shall determine the nature of the information to be reported; and that the Director, Office of Government Ethics shall cause to be published in the Federal Register on a periodical basis the information.[254]

6. That the express, statutory authority of federal agencies [*e.g.*, 31 U.S.C. § 1026 (1976); 35 U.S.C. §§ 31, 32 (1976); 43 U.S.C. § 1460 (1976)] to adopt standards of conduct for attorneys practicing before federal agencies and to impose discipline thereon for violation of the standards be reviewed in light of these Recommendations.

---

[253] *See* note 180, *supra* and preceding text.

[254] *See* note 243, *supra* and preceding text.

APPENDIX A STATE AND FEDERAL QUESTIONNAIRES

SURVEY

STATE QUESTIONNAIRE

This Survey of eleven (11) questions is intended to aid in making a recommendation to the Administrative Conference of the United States (5 U.S.C. §§571–576) on issues relating to discipline of attorneys practicing before federal agencies. RESPONSE TO THIS SURVEY IS VOLUNTARY. The information being solicited is not available from the National Center for Professional Responsibility (and other sources contacted). You are probably aware that the American Bar Association and other groups and individuals are addressing themselves to the need for more effective control over attorneys practicing before federal agencies and to the problems raised by attorneys whose practice brings them into contact with forums other than the state of their original admission. This has raised questions of, *inter alia*, whether there should be uniform standards of professional conduct for attorneys practicing before federal agencies (above and beyond the Code of Professional Responsibility) and whether current disciplinary procedures are adequate. This Survey is designed to obtain information with respect to the issues involved. Please feel free to comment on any matter related to the subject of inquiry even if the issue is not presented by a specific question.

1. You have authority to investigate, discipline, etc. an attorney licensed to practice by your State, without regard to whether misconduct occurs *within* or *without* your State.
TRUE ______ FALSE ______ (Please explain on separate sheet).

2. You *only* have authority to investigate, discipline, etc. an attorney licensed to practice by your State for a violation of a standard adopted by some official body (e.g., court, legislature, bar association) of your State.
TRUE ______ FALSE ______ (Please explain on separate sheet).

3. You have authority to investigate, discipline, etc. an attorney NOT licensed to practice by your State (but who has her/his principal office in your State) for misconduct which occurs *without* your State.
TRUE ______ FALSE ______.

4. You have authority to investigate, discipline, etc. an attorney NOT licensed to practice by your State for misconduct which occurs *within* your State.
TRUE ______ FALSE ______.

5. If you have authority to investigate, discipline, etc. an attorney NOT licensed to practice by your State for misconduct, which occurs *within* your State, the investigation, discipline, etc. would be for a violation of a standard adopted by
YOUR STATE ______ THE LICENSING STATE ______ BOTH ______
OTHER ______ (Please explain on separate sheet).
QUESTION NOT APPLICABLE ______.

6. If you have authority to investigate, discipline, etc. an attorney NOT licensed to practice by your State (but who has her/his principal office in your State) for misconduct which occurs *without* your State, the investigation would be for a violation of a standard adopted by
YOUR STATE ______ THE LICENSING STATE ______
THE STATE WHERE MISCONDUCT OCCURRED ______ OTHER ______ (Please explain on separate sheet)
QUESTION NOT APPLICABLE ______.

7. Does your State realistically have the interest, resources, etc. to pursue [pursue vigorously?] misconduct relating to federal agencies committed *within* your State by attorneys licensed to practice by your State?
YES ______ NO ______ (Please explain on separate sheet).

8. Does your State realistically have the interest, resources, etc. to pursue [pursue vigorously?] misconduct relating to federal agencies committed *without* your State by attorneys licensed to practice by your State?
YES ______ NO ______ (Please explain on separate sheet).

STATE QUESTIONNAIRE (BACK)

9. If you have authority to investigate, discipline, etc. an attorney NOT licensed to practice by your State,

a. does your State realistically have the interest, resources, etc. to pursue [pursue vigorously?] misconduct relating to federal agencies committed *within* your State by attorneys NOT licensed to practice by your State?
YES ______ NO ______ (Please explain on separate sheet).
QUESTION NOT APPLICABLE ______.

b. does your State realistically have the interest, resources, etc. to pursue [pursue vigorously?] misconduct relating to federal agencies committed *without* your State by an attorney NOT licensed to practice by your State (but who has her/his principal office in your State)?
YES ______ NO ______ (Please explain on separate sheet).
QUESTION NOT APPLICABLE ______.

10. Does your State have reciprocal discipline arrangements with:
a. other states? YES ______ (Please explain on separate sheet);
NO ______.
b. federal agencies? YES ______ (Please explain on separate sheet);
NO ______.

11. In addition to answering the ten (10) general questions, above, information is solicited on the number and disposition of complaints you have received in recent years relating to federal agencies. [The time period is left to your discretion, but at least the past five years is desirable.] Obviously, the names (or other identifying particulars) of the individuals involved are not being sought but rather "anonymous" data, to include, if possible, items of information such as: year, source of the complaint (e.g., private source or SEC, Treasury, Army JAGC, or the like), nature of the complaint, and the disposition/sanction (if any) imposed. The format, below, is suggested for the data:

			Disposition/Sanction	
Date	Source	Nature of Complaint	Private (Type)	Public (Type)

(continue on additional sheet(s) if required)

Name of State ______________________. Position Held ____________________________.

Thank you for your assistance in this matter. Please return this Survey (and additional pages needed for explanation) as soon as possible, but not later than June 28, 1982, in the self-addressed envelope provided.

Sincerely,
PROFESSOR MICHAEL P. COX
The University of Oklahoma College of Law
Norman, Oklahoma 73019

FEDERAL QUESTIONNAIRE

Survey: Discipline of Attorneys Practicing before Federal Agencies

This Survey of twenty (20) questions is intended to aid in making a recommendation to the Administrative Conference of the United States on issues relating to discipline of attorneys practicing before federal agencies. RESPONSE TO THIS SURVEY IS VOLUNTARY AND THE INFORMATION BEING SOLICITED IS NOT BEING COLLECTED BY OR FOR THE FEDERAL GOVERNMENT. You are probably aware that the American Bar Association and other groups and individuals are addressing themselves to the need for more effective control over attorneys practicing before federal agencies and to the problems raised by attorneys whose practice brings them into contact with forums other than the state of their original admission. This has raised questions of, *inter alia*, whether there should be uniform standards of professional conduct for attorneys practicing before federal agencies (above and beyond the Code of Professional Responsibility) and whether current disciplinary procedures are adequate. This Survey is designed to obtain your reactions and opinions on issues related to these questions and to obtain information derived from your experience with respect to the issues involved. Please feel free to comment on any matter related to the subject of inquiry even if the issue is not presented by a specific question.

Requirements for Admission to Practice

1. Should attorneys practicing before the agency with which you are associated [hereinafter referred to as "your agency"] be subject to requirements beyond those required by "The Agency Practice Act," 5 USC §500?
YES ______ NO ______.

2. If additional requirements were imposed, what type of requirements (if any) would be appropriate with regard to your agency? PLEASE EXPLAIN ON SEPARATE SHEET.

Standards of Professional Conduct

3. Has your agency promulgated particularized standards of practice relating to professional conduct beyond those required by an attorney's licensing state?
YES ______ NO ______.

4. If your agency does NOT have particularized standards, do you think they would be desirable for your agency?
YES ______ NO ______.

5. If your agency DOES have particularized standards, do you think they are desirable?
YES ______ NO ______.

6. If particularized standards exist [or were to be promulgated] for your agency, what considerations require [would require] your agency to impose standards beyond those applied to attorneys by their licensing states? PLEASE EXPLAIN ON SEPARATE SHEET.

7. Should different professional standards apply depending on whether the alleged misconduct arises out of a direct appearance before an agency (e.g., actually appearing before the agency; filing a document the contents of which were prepared by the attorney; and the like) or does not arise of a direct appearance (e.g., failure to "blow the whistle" on a corporate decision).
YES ______ NO ______.

8. Should uniform standards of professional conduct for federal agency practice be promulgated?
YES ______ NO ______.

9. By whom should any such uniform standards of professional conduct for federal agency practice be promulgated?
ABA ______ Federal Courts ______ Congress ______
Ad Hoc Group (Attorneys) ______ Ad Hoc Group (Agency Personnel) ______
Ad Hoc Group (Attorneys/Agency Personnel) ______ Other ______
(Please explain on separate sheet)

FEDERAL QUESTIONNAIRE (BACK)

10. Should any agencies be exempted from any such uniform standards of professional conduct for federal agency practice?
YES ______(Please explain on separate sheet) NO ______

Attorney Discipline

11. Do you feel that current procedures used by your agency effectively process and resolve misconduct by attorneys practicing before your agency?
YES ______ NO ______ (Please explain on separate sheet).

12. How does your agency process complaints against attorneys practicing before your agency?
Forward to Licensing State ______ In-House Agency Proceedings ______
Other ______(Please explain on separate sheet)

13. Are you in favor of the creation of a centralized federal authority to handle discipline of attorneys practicing before federal agencies?
YES ______ NO ______.

14. Whom should such a centralized authority use to screen and investigate a complaint arising out of misconduct before your agency?
US Attorney ______ Your Agency ______ Licensing Bar Counsel ______
Federal Magistrate ______ Federal Judge ______
The Centralized Authority ______ Other ______ (Please explain on separate sheet)

15. Whom should such a centralized authority use to dispose of a screened/investigated complaint, to include imposing discipline (if appropriate).
US Attorney ______ Your Agency ______ Licensing Bar Counsel ______
Federal Magistrate ______ Federal Judge ______
The Centralized Authority ______ Other ______ (Please explain on separate sheet)

16. Should any agencies be exempted from such a centralized authority for attorney discipline?
YES ______(Please explain on separate sheet) NO ______

17. Should attorneys sanctioned (e.g., suspension, disbarment) for misconduct before your agency be similarly restricted in their practice before all federal agencies?
Under a centralized authority approach: YES ______ NO ______
Under agency-by-agency approach: YES ______ NO ______

18. With respect to your agency, misconduct by attorneys arises:
Regularly ______ Periodically ______ Occasionally ______ Almost Never ______

19. How many instances of attorney misconduct (of such a nature as to warrant sanction) occur annually before your agency? ______; Are the attorneys involved generally sanctioned? YES ____ NO ______(Please explain on separate sheet)

20. What types of misconduct occur most frequently before your agency? PLEASE EXPLAIN ON SEPARATE SHEET.

Optional: Name of Agency ________________________; Position Held____________________;
Name ____________________________________.

Thank you for your assistance in this matter. Please return this Survey (and additional pages needed for explanation) in the enclosed return envelope.

Sincerely,

PROFESSOR MICHAEL P. COX
The University of Oklahoma
College of Law
Norman, Oklahoma 73019

APPENDIX B

MARCH 10, 1982 CHART: ATTORNEY MISCONDUCT BEFORE ELEVEN FEDERAL AGENCIES (PREPARED BY THE ABA CENTER FOR PROFESSIONAL RESPONSIBILITIES)

Administrative Agency
Disciplinary Proceedings
March 10, 1982

Agency	*Approximate Number of Lawyer Discipline Cases per Year*	*Has Agency Referred Lawyer Discipline Cases to State Agencies*	*Has Agency Been Satisfied with State Agencies' Handling of Cases*	*How Many Lawyer Discipline Cases Did Agency Handle in 1981*
1. Civil Aeronautics Board (CAB)	One case every several years	No	----	0
2. Federal Trade Commission (FTC)	One case every two years	One case in past five years	No idea what happened with case; never heard anything from state	0
3. Interstate Commerce Commission (ICC)	Ten cases per year	Yes—over past six months have referred all their cases	Extremely pleased thus far	2
4. Office of Personnel Management (OPM)	Never had a case	No	----	0
5. Securities and Exchange Commission (SEC)	Thirty-five cases per year investigated; one per year goes to administrative proceeding	About fifteen cases in past five years	Pleased with some states, displeased with others	5–6
6. Department of Treasury (DOT)	Fifty cases per year	No	----	about 50

Agency	*Approximate Number of Lawyer Discipline Cases per Year*	*Has Agency Referred Lawyer Discipline Cases to State Agencies*	*Has Agency Been Satisfied with State Agencies' Handling of Cases*	*How Many Lawyer Discipline Cases Did Agency Handle in 1981*
7. Nuclear Regulatory Commission (NRC)	One case every four years	No	----	0
8. Department of Justice (DOJ)	no response			
9. National Labor Relations Board (NLRB)	18–20 in 55 years; all for misconduct in hearings	No	----	0
10. Department of Energy (DOE)	Never had a case	No	----	0—(DOE) (Federal Energy Regulatory Commission–FERC)—2 reprimands
11. Federal Communications Commission (FCC)	Two cases within last five years	No	----	0

APPENDIX C SELECTED BIBLIOGRAPHY

1. STATUTES

5 U.S.C. § 105 (1976): Government Organization and Employees/Organization (Executive Agency).

5 U.S.C. § 301 (1976): Government Organization and Employees/Powers (Departmental Regulations).

5 U.S.C. § 500 (1976): Government Organization and Employees/Administrative Procedure (Administrative Practice) [Agency Practice Act].

5 U.S.C. § 555 (1976): Government Organization and Employees/Administrative Procedure (Ancillary Matters) [Administrative Procedures Act].

5 U.S.C. App. I §§ 401 *et seq.* (Supp. IV 1980): Office of Government Ethics [Title IV, Ethics in Government Act].

15 U.S.C. § 78w(a)(1) (1976): Commerce and Trade/Securities Commission (Rules, Regulations, and Orders; Annual Reports).

18 U.S.C. § 207 (Supp. IV 1980): Crimes and Criminal Procedure/Bribery, Graft and Conflicts of Interest (Disqualification of Former Officers and Employees: Disqualifications of Current Officers and Employees) [Title V, Ethics in Government Act].

18 U.S.C. § 1905 (Supp. IV 1980): Crimes and Criminal Procedure/Public Officers and Employees (Disclosure of Confidential Information Generally).

26 U.S.C. § 6103(a) (1976): Internal Revenue Code/Information and Returns (Confidentiality and Disclosure of Returns and Return Information).

26 U.S.C. § 7213(a)(1) (Supp. IV 1980): Internal Revenue Code/Crimes, Other Offenses and Forfeitures (Unauthorized Disclosure of Information).

26 U.S.C. § 7217 (Supp. IV 1980): Internal Revenue Code/Crimes, Other Offenses and Forfeitures (Civil Damages for Unauthorized Disclosure of Returns and Return Information).

29 U.S.C. § 156 (1976): Labor/Labor-Management Relations (Rules and Regulations).

31 U.S.C. § 1026 (1976): Money and Finance—Department of the Treasury (Rules for Government of Agents Representing Claimants).

35 U.S.C. § 1 (1976): Patents/Establishment, Officers, Functions (Establishment).

35 U.S.C. § 31 (1976): Patents/Practice before the Patent and Trademark Office (Regulations for Agents and Attorneys).

35 U.S.C. § 32 (1976): Patents/Practice before the Patent and Trademark Office (Suspension or Exclusion from Practice).

35 U.S.C. § 122 (1976): Patents/Application for Patent (Confidential Status of Applications).

35 U.S.C. § 181 (1976): Patents/Secrecy of Certain Inventories and Filing Applications in Foreign Country (Secrecy of Certain Inventories and Withholding of Patent).

35 U.S.C. § 186 (1976): Patents/Secrecy of Certain Inventions and Filing Applications in Foreign Country (Penalty).

38 U.S.C. § 3301(j) (Supp. IV 1980): Veterans' Benefits/Records and Investigations (Confidential Nature of Claims).

38 U.S.C. § 3305 (Supp. IV 1980): Veterans' Benefits/Records and Investigations (Confidentiality of Medical Quality Assurance Records).

43 U.S.C. § 1464 (1976): Public Lands/Department of the Interior (Agents or Attorneys Representing Claimants before Department).

2. Regulations

Agriculture, Dept. of:
7 C.F.R. § 1.26(b)(1) (admission)
7 C.F.R. § 1.26(b)(2) (suspension)
7 C.F.R. § 1.26(b)(3)–(4) (practice/conduct)

Immigration and Naturalization Service:
8 C.F.R. § 292.1(a)(1) (admission)
8 C.F.R. § 292.3 (suspension/disbarment)

Federal Reserve:
12 C.F.R. § 263.3(a) (admission)
12 C.F.R. § 263.3(b) (conduct)

Federal Deposit Insurance Corporation:
12 C.F.R. § 308.04(a) (admission)
12 C.F.R. § 308.04(b) (suspension)
12 C.F.R. § 308.04 (practice)

Federal Home Loan Bank Board:
12 C.F.R. § 509.3(a) (admission)
12 C.F.R. § 509.3(b) (suspension)
12 C.F.R. § 509.3 (practice, general)

Small Business Administration:
13 C.F.R. § 103.13-3(b) (admission)
13 C.F.R. § 103.13-4 (suspension)
13 C.F.R. § 104.1 (conduct)

Civil Aeronautics Board:
14 C.F.R. §§ 300.5–300.6 (rules of conduct)
14 C.F.R. § 300.20 (suspension)
14 C.F.R. §§ 300.13–300.14 (disqualification of former Board members)

Federal Trade Commission:
16 C.F.R. § 4.1(a) (admission)
16 C.F.R. § 4.1(e) (conduct/disbarment)

Consumer Product Safety Commission:
16 C.F.R. 1025.64 (admission)
16 C.F.R. 1025.66 (conduct)
16 C.F.R. 1025.67 (former employees)

Commodity Futures Trading Commission:
17 C.F.R. § 10.11(a)(2) (admission)
17 C.F.R. §§ 14.1–14.10 (suspension/disbarment)

Securities and Exchange Commission:
17 C.F.R. § 201.2 (appearance/practice)
17 C.F.R. § 201.2(e) (suspension/disbarment)

Federal Energy Regulatory Commission:
18 C.F.R. § 1.4(a) (admission)
18 C.F.R. § 1.4(b) (suspension)

United States International Trade Commission:
19 C.F.R. §§ 201.13–201.15 (admission)

Social Security Administration:
20 C.F.R. §§ 404.1745–404.179 (admission)

Labor, Dept. of (Employee Compensation Appeals Board):
20 C.F.R. § 501.11(a) (admission)
20 C.F.R. § 501.11(b) (conduct, former employees)
20 C.F.R. § 501.11(c) (disbarment)

Drug Enforcement Administration, Dept. of Justice:
21 C.F.R. § 1316.50 (admission)
21 C.F.R. § 1316.51 (conduct)

Housing and Urban Development, Dept. of:
24 C.F.R. §§ 2.11–2.12 (admission)
24 C.F.R. § 2.13 (exclusion from hearing)

Office of Interstate Lands Sales Registration (HUD):
24 C.F.R. § 17.20.120(a) (admission)
24 C.F.R. § 17.20.130 (former employee)
24 C.F.R. § 17.20.135(a) (conduct/practice)
24 C.F.R. § 17.20.135(b)-(c) (exclusion from hearing)

National Labor Relations Board:
29 C.F.R. 102.44(a), (b) (suspension/disbarment)

Federal Mine Safety and Health Review Commission:
29 C.F.R. § 2700.3 (admission)
29 C.F.R. § 2700.80(a)–(c) (conduct)
29 C.F.R. § 2700.81(c)–(e) (suspension/disbarment)

Treasury, Dept. of (Bureau of Alcohol, Tobacco, and Firearms):
31 C.F.R. § 8.2(a), (c), (d) (admission)
31 C.F.R. § 8.2(e) (government employees)
31 C.F.R. § 8.21(a), (d) (admission)
31 C.F.R. § 8.22 (admission)
31 C.F.R. §§ 8.31–8.42 (conduct)
31 C.F.R. §§ 8.51–8.52 (suspension/disbarment)

Internal Revenue Service, Treasury Dept.:
31 C.F.R. § 10.3(a), (d) (admission)
31 C.F.R. §§ 10.20–10.32 (conduct/practice)
31 C.F.R. §§ 10.50–10.75 (suspension/disbarment)

Patent and Trademark Office:
37 C.F.R. § 1.341(a) (admission)
37 C.F.R. § 1.348 (suspension/disbarment)

United States Postal Service:
39 C.F.R. §§ 951.2(c)–951.3 (admission)
39 C.F.R. §§ 951.5, 952.1–952.34 (conduct/practice)
39 C.F.R. §§ 951.6–951.7 (suspension/disbarment)

Interior, Dept. of:
43 C.F.R. § 1.3 (admission)
43 C.F.R. § 1.6(a) (conduct; ABA Canons)
43 C.F.R. § 1.6(b)–(c) (suspension)

Maritime Administration:
46 C.F.R. § 201.20 (admission)
46 C.F.R. § 201.25 (conduct)
46 C.F.R. § 201.24 (suspension/disbarment)
46 C.F.R. § 201.26 (former employees)

Federal Maritime Commission:
46 C.F.R. § 502.26 (admission)
46 C.F.R. § 502.30 (suspension/disbarment)
46 C.F.R. § 502.32 (former employees)

Federal Communications Commission:
47 C.F.R. § 1.23 (admission)
47 C.F.R. § 1.24 (suspension/disbarment)

Interstate Commerce Commission:
49 C.F.R. § 1100.8 (admission)
49 C.F.R. § 1100.11 (suspension/disbarment)

Miscellaneous Regulations:

a. 1 C.F.R. § 305.79-7 (1982): Administrative Conference of the United States/ Appropriate Restrictions on Participation by a Former Agency Official in Matters Involving the Agency (Recommendation No. 79-7).

b. 5 C.F.R. Part 735 (1982): Office of Personnel Management/Employee Responsibilities and Conduct.
c. 17 C.F.R. § 201.2(e) (1982): Securities and Exchange Commission/Rule of Practice (Appearance and Practice before the Commission) [Rule 2(e)].
d. 20 C.F.R. § 404.1707 (1982): Social Security Administration/Representation of Parties (Appointing a Representative).

3. JUDICIAL DECISIONS

Upjohn v. United States, 449 U.S. 383 (1981).

S.E.C. v. Sloan, 436 U.S. 103 (1978).

Weatherford v. Bursey, 429 U.S. 545 (1977).

Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Assoc., 426 U.S. 482 (1976).

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

Withrow v. Larkin, 421 U.S. 35 (1975).

In re Griffiths, 413 U.S. 717 (1973).

N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759 (1969).

In re Ruffalo, 390 U.S. 544 (1968).

Sperry v. Florida, 373 U.S. 379 (1963).

Theard v. United States, 354 U.S. 278 (1957).

Schware v. Board of Bar Examiners, 353 U.S. 236 (1957).

Cammer v. United States, 350 U.S. 399 (1956).

In re Murchison, 349 U.S. 133 (1955).

Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).

Kingsland v. Dorsey, 338 U.S. 318 (1949).

Precision Instrument Manuf. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806 (1945).

Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926).

Bratton v. Chandler, 260 U.S. 110 (1922).

In the Matter of the Petition of Selling, 243 U.S. 46 (1917).

I.C.C. v. Brimson, 154 U.S. 447 (1894).

Manning v. French, 133 U.S. 447 (1890).

Ex Parte Robinson, 86 U.S. 505 (1873).

Gibson v. Veterans Administrator and the United States, No. 81-1933, Slip Op. (D.C.Cir. Jul. 13, 1982).

Ford Motor Co. v. F.T.C., 654 F.2d 599 (9th Cir. 1981).

Wachovia Bank & Trust Co., N.A. v. National Student Marketing Corp., 650 F.2d 342 (D.C.Cir. 1980).

Simons v. Bellinger, 643 F.2d 774 (D.C.Cir. 1980).

Touche Ross & Co. v. S.E.C., 609 F.2d 570 (2d Cir. 1979).

S.E.C. v. Arthur Young & Company, 590 F.2d 785 (9th Cir. 1979).

S.E.C. v. Blatt, 583 F.2d 1325 (5th Cir. 1978).

S.E.C. v. Coven, 581 F.2d 1020 (2d Cir. 1978).

Koden v. United States Department of Justice, 564 F.2d 228 (7th Cir. 1977).

Arthur Lipper Corp. v. S.E.C., 547 F.2d 171 (2d Cir. 1976).

S.E.C. v. Universal Major Industries, 546 F.2d 1044 (2d Cir. 1976).

Charlton v. F.T.C., 543 F.2d 903 (D.C.Cir. 1976).

United States v. Pastore, 537 F.2d 675 (2d Cir. 1976).

S.E.C. v. Csapo, 533 F.2d 7 (D.C.Cir 1976).

In the Matter of Abrams, 521 F.2d 1094 (3d Cir. 1975).

S.E.C. v. Management Dynamics, Inc., 515 F.2d 801 (2d Cir. 1975).

Meyerhofer v. Empire Fire and Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974).

Fields v. S.E.C., 495 F.2d 1075 (D.C.Cir. 1974).

S.E.C. v. Spectrum, Ltd., 489 F.2d 535 (2d Cir. 1973).

In the Matter of Bithoney, 486 F.2d 319 (1st Cir. 1973).

Kivitz v. S.E.C., 475 F.2d 956 (D.C.Cir. 1973).

Erdmann v. Stevens, 458 F.2d 1205 (2d Cir. 1972).

S.E.C. v. Manor Nursing Centers, Inc., 458 F.2d 1082 (2d Cir. 1972).

Bogart v. Carter, 445 F.2d 321 (9th Cir. 1971).

Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970).

Great Lakes Screw Corp. v. N.L.R.B., 409 F.2d 375 (7th Cir. 1969).

S.E.C. v. Frank, 388 F.2d 486 (2d Cir. 1968).

In re Rhodes, 370 F.2d 411 (8th Cir. 1967).

WEN Products Inc. v. Portable Electric Tools, Inc., 367 F.2d 764 (7th Cir. 1966).

United States v. Benjamin, 328 F.2d 854 (2d Cir. 1964).

Coughlin v. United States, 236 F.2d 927 (9th Cir. 1956).

Herman v. Dulles, 205 F.2d 715 (D.C.Cir 1953).

N.L.R.B. v. Weirton Steel Co., 135 F.2d 494 (3d Cir. 1943).

Wright v. S.E.C., 112 F.2d 89 (2d Cir. 1940).

McDaniel v. Israel, 53 Ad.L.2d 521 (W.D.Va. 1982).

S.E.C. v. National Student Marketing Corp., 457 F.Supp. 682 (D.D.C. 1978).

Washburn v. Shapiro, 409 F.Supp. 3 (S.D.Fla. 1976).

Crimmins v. American Stock Exchange, 368 F.Supp. 270 (S.D.N.Y. 1973).

S.E.C. v. Century Investment Transfer Corp. [1971–72 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶93,232 (S.D.N.Y. 1972).

Escott v. Barchris Constr. Corp., 283 F.Supp. 643 (S.D.N.Y. 1968).

Schwebel v. Orrick, 153 F.Supp. 701 (D.D.C. 1957).

Herman v. Acheson, 108 F.Supp. 723 (D.D.C. 1952).

Camp v. Herzog, 104 F.Supp. 134 (D.D.C. 1952).

Cupples v. Marzell, 101 F.Supp. 597 (D.D.C. 1952).

Hatch v. Ooms, 69 F.Supp. 788 (D.D.C. 1947).

Phillips v. Ballinger, 37 App.D.C. 46 (1911).

Garfield v. United States ex rel. Stevens, 32 App.D.C. 109 (1908).

In the Matter of Carter and Johnson [SEC Release No. 34-17597, Feb. 28, 1981] Fed.Sec.L.Rep. (CCH), No. 903 (Spec. Ed. Mar. 6, 1981).

Matter of DeAnda, 46 Ad.L.2d 562 (Atty.Gen. 1979).

Matter of Consumers Power Co., 46 Ad.L.2d 20 (N.R.C. 1979).

Matter of Keating, Muething & Klekamp, 45 Ad.L.2d 1072 (S.E.C. 1979).

In the Matter of Vandergrift [I.C.C. No. 352] (1979).

Matter of Toledo Edison Co., 39 Ad.L.2d 769 (N.R.C. 1976).

Matter of Puerto Rico Water Resources Authority, 38 Ad.L.2d 761 (N.R.C. 1976).

In re Peter D. Bogart, 38 Ad.L.2d 124 (Atty.Gen. 1976).

In re Emanuel Fields, 33 Ad.L.2d 439 (S.E.C. 1973).

In re Murphy, 125 Cal.Rptr. 276, 542 P.2d 12 (1975).

Brotsky v. State Bar of California, 19 Cal.Rptr. 153, 368 P.2d 697 (1962).

In the Matter of Abrams, 65 N.J. 172, 320 A.2d 471 (1974).

4. Publications

Acklie, *ABA Canons of Ethics as Applied to Motor Carriers Lawyers' Association*, 19 Ad.Law Rev. 398–407 (1967).

Agata, *Admissions and Discipline of Attorneys in Federal District Courts: A Study and Proposed Rules*, 3 Hofstra L.Rev. 249–93 (1975).

Alexander, *Screening Former Government Attorneys to Prevent Disqualifying Their Law Firms*, 53 N.Y.S.B.J. 552–57 (1981).

Allen, *The ''Revolving Door''—Should It Be Stopped? (Panel V)*, 32 Ad.L. Rev. 383–409 (1980).

Best, *In Opposition to Rule 2(e) Proceedings*, 36 Bus.Law. 1815–17 (1981).

Bialkin, *SEC Clears Air Concerning Lawyers; Disclosure Duties*, 185 N.Y.L.J., March 17, 1981, at 1, Col. 1.

Cary, *Lawyers' Responsibilities and Liabilities under the Securities Laws*, 11 Colum.J.L. & Soc. Prob. 99–132 (1974).

Courie, ''Lawyer Discipline Code Drafted,'' 3 Legal Times Washington, March 30, 1981, at 3, Col. 1.

Daley and Karmel, *Attorneys' Responsibilities: Adversaries at the Bar of the SEC*, 24 Emory L.J. 747–825 (1975).

Dann, *Ethics in the Government Act of 1978*, 62 J.Pat.Off.Soc'y. 721–31 (1980).

Deale, *Statement on Ethics and the Administrative Process*, 25 J.B.A.D.C. 570–77 (1958).

Dolin, *SEC Rule 2(e) after Carter and Johnson: Toward a Reconciliation of Purpose and Scope*, 9 Sec.Reg.L.J. 331–73 (1982).

Elliott, Correspondence [Re: 65 Geo.L.J. 1025 (1977)], 66 Geo.L.J. 195–99 (1977).

Evans, *The Airlie House Conference: Ethical Responsibilities of Corporate Lawyers*, 33 Bus.Law. 1173–1586 (1978).

Ferrara, *Administrative Disciplinary Proceedings under Rule 2(e)*, 36 Bus.Law. 1807–13 (1981).

Fiflis, *Choice of Federal or State Law for Attorneys' Professional Responsibility in Securities Matters*, 56 N.Y.U.L.Rev. 1236–84 (1981).

Freeman, *Recent Governmental Attacks on the Private Lawyer as an Infringement of the Constitutional Right to Assistance of Counsel*, 36 Bus.Law. 1791–97 (1981).

Friendly, *Some Kind of Hearing*, 123 U.Pa.L.Rev. 1267–1317 (1975).

Goldberg, *Policing Responsibility of the Securities Bar. The Attorney-Client Relationship and the Code of Professional Responsibility—Considerations for Expertizing Securities Attorneys*, 19 N.Y.L.F. 221–68 (1973).

Gruenbaum, *The SEC's Use of Rule 2(e) to Discipline Accountants and Other Professionals*, 56 Notre Dame Law. 820–37 (1981).

Hershman, *ABA National Institute: Advisors to Management—Responsibilities and Liabilities of Lawyers and Accountants*, 30 Bus.Law. (Special Issue) 1–227 (1975).

Hester, *New IRS Directive Clears Up Some, but Not All Attorney Conflict-of-Interests Problems*, 53 J.Tax 86–87 (1980).

Hester, ''Are New Treasury Rules a Tax Device in Disguise?,'' 3 Legal Times Washington, Sept. 29, 1980, at 12, Col. 1.

Johnson, *Expanding Responsibility of Attorneys in Practice before the SEC: Disciplinary Proceedings under Rule 2(e) of the Commission's Rules of Practice*, 25 Mercer L.Rev. 637–69 (1974).

Johnson, *The Dynamics of SEC Rule 2(e): A Crisis for the Bar*, 1975 Utah L.Rev. 629–61 (1975).

Kalish, *The Nebraska Supreme Court, The Practice of Law and the Regulation of Attorneys*, 59 Neb. L.Rev. 555–600 (1980).

Karmel, *Attorneys' Securities Laws Liabilities*, 27 Bus.Law. 1153–64 (1972).

Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 Harv.L.Rev. 657–69 (1957).

Kellcher, *Scourging the Money Lenders from the Temple: The SEC, Rule 2(e), and the Lawyer*, 17 San Diego L.Rev. 801–56 (1980).

Kosek, *Professional Responsibility of Accountants and Lawyers before the SEC*, 72 L.Lib.J. 453–69 (1979).

Kramer, Correspondence [re: 65 Geo.L.J. 1025 (1977)], 66 Geo.L.J. 191–93 (1977).

Kronstein, *The Carter-Johnson Case: A Higher Threshold for SEC Actions against Attorneys*, 9 Securities Reg.L.J. 293–96 (1981).

Lacovara, *Restricting the Private Law Practice of Former Government Lawyers*, 20 Ariz.L.Rev. 369–402 (1978).

Lempert, ''IRS Mulls Attorney Shelter Crackdown,'' 2 Legal Times Washington, Dec. 3, 1979, at 1, Col. 2.

Lindgren, *Toward a New Standard of Attorney Disqualification*, 1982 Am.B.Found. 421–58.

Lorne, *Attorney-Client Relationship after Carter and Johnson*, 3 J.Comp.Corp.L. & Sec. Reg. 151–65 (1981).

Marcus, ''SEC Reasserts Right to Punish Lawyers,'' 3 Nat.L.J., March 16, 1981, at 12, Col. 12.

Marquis, *An Appraisal of Attorneys' Responsibilities before Administrative Agencies*, 26 Case W.Res.L.Rev. 285–314 (1976).

Marsh, *Rule 2(e) Proceedings*, 35 Bus.Law. 987–1019 (1980).

Masters, ''SEC Lawyer Favors Narrower Attorney Discipline Approach,'' 4 Legal Times Washington, Jan. 18, 1982, at 1, Col. 1.

Mathews, *Injunctive Proceedings Against Attorneys*, 36 Bus.Law. 1819–29 (1981).

McKay, *An Administrative Code of Ethics: Principles and Implementation*, 47 A.B.A.J. 890–96 (1961).

Moore, "FERC Criticizes Lawyers' Work," 4 Legal Times Washington, Jan. 4, 1982, at 2, Col. 3.

O'Toole, *Canon 9 of the Code of Professional Responsibility: An Exclusive Guideline*, 62 Mar.L.Rev. 313–50 (1979).

Patterson, *A Preliminary Rationalization of the Law of Legal Ethics*, 57 N.C.L.Rev. 519–58 (1979).

Pickholz, *The Proposed Model Rules of Professional Conduct—and Other Assaults Upon the Attorney-Client*, 36 Bus.Law. 1841–62 (1981).

Pollack, *The SEC Lawyer: Who Is His Client and What Are His Responsibilities?*, 49 Geo.Wash.L.Rev. 453–61 (1981).

Ross, *Proposed IRS Rule Would Place Sanction on Lawyer for Abusive Tax Shelter*, 36 Mo.B.J. 423–29 (1980).

Sax, *Lawyer Responsibility in Tax Shelter Opinions*, 34 Tax Law. 5–46 (1980).

Shapiro, *Post Employment Restriction of Ohio Ethics Law*, 7 Ohio North.L.Rev. 913–42 (1980).

Small, *An Attorney's Responsibility under Federal and State Securities Law: Private Counselor or Public Servant*, 61 Calif.L.Rev. 1189–1235 (1973).

Stewart, *Professional Ethics for the Business Lawyer: Morals of the Market Place*, 31 Bus.Law. 462–68 (1975).

Sutton, *How Vulnerable Is the Code of Professional Responsibility*, 57 N.C.L.Rev. 497–517 (1979).

Vaughn, *The Role of Statutory Regulation of Public Service in Great Britain and the United States*, 4 Hastings Int. & Comp.L.Rev. 341–98 (1981).

Vilkin, "SEC Seeks Comments on 2(e) Approach," 4 Legal Times Washington, Sept. 21, 1981, at 4, Col. 4.

Vilkin, "Williams Aiming for Decision Soon in Rule 2(e) Case," 3 Legal Times Washington, Dec. 15, 1980, at 5, Col. 1.

Walter, *Practice before Federal Administrative Agencies,* 18 I.C.C. Prac.J. 29–35 (1950).

Waterman, *Federal Administrative Bar: Admission and Disbarment*, 3 Univ.Chi.L.Rev. 261–76 (1936).

Yarowsky, *Attorneys' Fees in Social Security Proceedings*, 17 Kan. L.Rev. 79–89 (1968).

Note, *Disciplinary Proceedings Against Attorneys under Rule 2(e)*, 79 Mich.L.Rev. 1270–89 (1981).

Note, *Representation of Clients Before Administrative Agencies: Authorized or Unauthorized Practice of Law?*, 15 Val.U.L.Rev. 567–604 (1981).

Note, *Business as Usual: The Former Government Attorney and A.B.A. Rule 5-105(D)*, 28 Hastings L.J. 1537–68 (1977).

Note, *Ethical Problems for the Law Firm of a Former Government Attorney: Firm or Individual Disqualification?*, 1977 Duke L.J. 512–31 (1977).

Note, *Conflicts of Interest and the Former Government Attorney*, 65 Geo.L.J. 1025–55 (1977).

Note, *The Duties and Obligations of the Securities Lawyer: The Beginning of a New Standard for the Legal Profession?*, 1975 Duke L.J. 121–47 (1975).

Note, *Former Government Attorneys and the Appearance of Evil Doctrine*, 16 B.C.Ind. & Com.L.Rev. 651–63 (1975).

Note, *Representation before Federal Administrative Agencies and the Unauthorized Practice of Law*, 1964 Wis.L.Rev. 469–77 (1964).

Note, *The Power of Administrative Agencies to Commit for Contempt*, 35 Colum.L.Rev. 578–91 (1935).

Comment, *Firm Disqualification and the Former Government Attorney: Armstrong v. McAlpin*, 42 Ohio S.L.J. 579–602 (1981).

Comment, *Attorney Liability under SEC Rule 2(e): A New Standard*, 11 Tex.Tech L.Rev. 83–111 (1979).

Comment, *SEC Disciplinary Rules and the Federal Securities Laws: The Regulation, Rule and Responsibility of the Attorney*, 1972 Duke L.J. 969–1022 (1972).

____, *Comments to SEC Zero in on Agency Authority*, 68 A.B.A.J. 252 (1982).

____, ''SEC's Official Speech Urging Narrow 2(e) Approach,'' 4 Legal Times Washington, Jan. 25, 1982, at 25, Col. 1.

____, ''Karmel Blasts SEC Discipline of Attorneys,'' 67 A.B.A.J. 1097 (1981).

____, ''Uniform Rules Statute Proposed,'' 1 Ad.Law Bulletin 13–43 (1949).

____, ''Proposed Practitioners Act Reported by House Committee,'' 1 Ad.Law Bulletin 97–118 (1949).

____, ''News of Interest to Practitioners,'' 26 I.C.C. Prac.J. 1194–1200 (1959).

____, Report of the Tax Section Executive Committee on the Treasury's Proposed Amendment to Cir. 230, 53 N.Y.S.B.J. 202–35 (1981).

____, ''Whistleblowing'' Rule Rejected by SEC, 66 A.B.A.J. 704 (1980).

____, *The Code of Professional Responsibility and the Responsibility of Lawyers Engaged in Securities Practice*, 30 Bus.Law. 1289–1301 (1975).

____, Statement of the Section of Corporation, Banking and Business Law in Response to Securities Exchange Act No. 16045 (July 31, 1979), 35 Bus.Law. 605–15 (1980).

____, ''New Treasury Regulation on Enrollment and Disbarment,'' 12 Tax Mag. 610–12 (1934).

* * * * * * *

F. vom Baur, Standards of Admission for Practice before Federal Administrative Agencies (1953).

R. Weintraub, Commentary on Conflict of Laws §4.4 (2d ed. 1980).

A.B.A. Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (Final Report/June 1970) [Clark Committee Report].

Attorney General's Manual on the Administrative Procedure Act (1947).

Commission on Organization of the Executive Branch of Government, Commission Report on Legal Services and Procedures (1955) [Hoover Commission Report].

Commission on Organization of the Executive Branch of Government, Task Force Report on Legal Services and Procedure (1955) [Hoover Commission Task Force Report].

Senate Comm. on the Judiciary, Abolishing Admission Requirements for Licensed Attorneys before Federal Administrative Agencies, S. Rep. No. 755, 89th Cong., 1st Sess. (1965).

1965 U.S.Code Cong. & Admin. News 4170–80.

SELECTED CONSULTANT REPORT
(AS PUBLISHED IN THE GEORGE WASHINGTON LAW
REVIEW, VOL. 51, NO. 1, NOV. 1982)

The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade

Teresa M. Schwartz*

TABLE OF CONTENTS

I. Origins of the Consumer Product Safety Act
  A. The National Commission on Product Safety
    1. Findings of the NCPS
    2. Recommendations
  B. The Consumer Product Safety Act
II. Petitioning Process Under the CPSA
  A. Background
  B. Implementation of Section 10
    1. Setting Priorities via Petitions
      a. The Agency's Reactive Posture
      b. The Pool Slide Fiasco
    2. Management of the Petitioning Process
      a. The Early Years
      b. Criticism and Reform
    3. Changing Role of Petitions
  C. Revocation of Section 10
  D. Reflections on the Process

Copyright © 1982 by Teresa M. Schwartz.

* Associate Dean and Professor of Law, The National Law Center, George Washington University; A.B. 1965, Stanford University; J.D. 1971, The National Law Center, George Washington University. This Article was prepared under a contract with the Administrative Conference of the United States. It represents solely the views of the author and has not been reviewed or approved by the Administrative Conference.

III. Standard Setting — The Offeror Process
  A. Background
  B. The Statutory Scheme — A Closer Look
    1. Section 7: Stage One of the Process
    2. Section 9: Stage Two of the Process
  C. Implementation — An Overview
  D. Reflections on the Process
    1. A Lengthy and Costly Process
    2. Why So Slow?
    3. Final Rules Undone
    4. Could the Offeror Process Have Worked?
  E. Alternatives to Mandatory Standards
    1. Bans
    2. Recalls
    3. Voluntary Standards
  F. Offeror Process Abolished
IV. Conclusion
  A. An Overview
    1. Delegation of a Difficult Task
    2. Expectations About Standards
    3. Measures of Agency Performance
  B. Mandatory Standards
    1. A Flawed Procedural Framework
    2. Public Participation Procedures
    3. Statutory Deadlines
  C. The Petitioning Process
  D. General Reflections on Procedural Reform
V. Appendix: A Case Study — The Lawn Mower Standard
  A. Initiation by Industry Petition
  B. Selecting An Offeror
    1. Notice of Proceeding Inviting Offers
    2. Offers Submitted
    3. Offer Accepted
  C. Offeror Development
    1. Organizing the Effort
    2. The Proposed Standard
  D. CPSC Evaluation of Proposed Standard
  E. Final Stage of Standard Setting
  F. Judicial Review
  G. Congressional Review
  H. Petition for Delay
  I. Reflections on the Process

In 1972, Congress enacted the Consumer Product Safety Act

(CPSA):[1] the capstone to a series of safety statutes enacted during the "Consumer Decade" of the 1960's.[2] Congress designed the CPSA as a comprehensive regulatory scheme "to protect the public against unreasonable risks of injury associated with consumer products,"[3] and created for its implementation a new independent agency, the Consumer Product Safety Commission (CPSC or the Commission).[4] To enable the Commission to carry out its broad mandate, Congress gave it a panoply of administrative enforcement tools and the right to seek a wide range of judicial remedies.

The heart of the Commission's authority was its power to set mandatory product safety standards. Congress assumed that mandatory standards would be the most effective means of eliminating product-related injuries. It thus delegated to the Commission the essentially legislative task of selecting products to be regulated and issuing broad, industry-wide safety standards whenever it found them to be "reasonably necessary" and "in the public interest."[5]

The Commission's legislative role was similar to that of many agencies charged with implementing broad legislative mandates through rulemaking.[6] The major difference was in the novel public participation procedures that Congress required the Commission to follow: the CPSA afforded the public unprecedented legal rights to petition the Commission for standards[7] and to participate in the early stages of standards development.[8]

In theory, the CPSA's public participation model seemed well designed to facilitate the Commission's legislative tasks, for it assured representation to both consumer and business interests.[9] In practice, however, the model proved difficult to implement. From the beginning, delays plagued the Commission's efforts to use the new procedures, and contrary to widespread expectations, the Commission issued few mandatory standards. The Commission was harshly criticized from all quarters — Congress, consumer organizations, and business groups — for its implementation failures. The procedural experiments, begun eight years earlier, ended with enactment of the Consumer Product Safety Amendments of 1981.[10] The amendments abolished the unique aspects of both the petitioning and standard-setting procedures.

---

[1] Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified as amended at 15 U.S.C. §§ 2051-2083 (1976 & Supp. V 1981)).

[2] In 1972, the National Business Council for Consumer Affairs compiled a list of 47 federal consumer protection laws enacted since 1890. Fewer than half, or 21 statutes, were enacted in the first 75 years, and the remaining 26 were enacted between 1966 and 1972. PROCEEDINGS OF THE BRIEFING CONFERENCE ON THE CONSUMER PRODUCT SAFETY ACT 5 (1973) (sponsored by Product Safety Letter, Inc.) [hereinafter cited as PSL BRIEFING CONFERENCE]. As a result of all the consumer-oriented legislation, the 1960's became known as the "Consumer Decade." S. REP. NO. 749, 92d Cong., 2d Sess. 3 (1972), *reprinted in* BNA, THE CONSUMER PRODUCT SAFETY ACT app. 61, 63 (1973).

[3] 15 U.S.C. § 2051(b)(1) (1976).

[4] *Id.* § 2053(a).

[5] *Id.* § 2058(c)(2)(A)-(B) (Supp. II 1972) (current version at 15 U.S.C. § 2058(f)(3)(A)-(B) (Supp. V 1981)). Such general statutory guidelines delegated to the Consumer Product Safety Commission (CPSC or Commission) wide discretion to balance broad social goals and the competing claims of private interests in selecting products to regulate and in defining the contents of the regulations. *See* Stewart, *The Reformation of American Administrative Law,* 88 HARV. L. REV. 1669, 1683-84 (1975).

[6] *See, e.g.,* The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 652(8), 655(b) (1976) (delegating to the Secretary of Labor broad legislative authority to set occupational safety and health standards that are "reasonably necessary or appropriate to provide safe or healthful employment"); The Federal Trade Commission Act, 15 U.S.C. § 45(a)(2) (1976) (delegating to the FTC the authority to regulate "unfair or deceptive acts or practices").

[7] 15 U.S.C. § 2059 (1976) (repealed 1981).

[8] *Id.* § 2056 (amended 1978, 1981).

[9] One scholar has suggested that if in fact an agency's role is largely legislative, the administrative process should be designed to resemble the legislative-political process. Stewart, *supra* note 5, at 1684. The Consumer Product Safety Act (CPSA) procedures, of course, did not replicate the legislative process. In fact, they gave participation rights to the public vis-à-vis the CPSC that the public does not have vis-à-

This Article takes a historical look at the creation, implementation, and demise of the CPSA's public participation provisions for petitions and standards setting in the hope that those who may create or implement procedural reforms in the future can learn from these experiments.[11]

I. *Origins of the Consumer Product Safety Act*

A. *The National Commission on Product Safety*

The legislative origins of the Consumer Product Safety Act date back to the mid-1960's. Following the enactment of a series of safety statutes dealing with a variety of products,[12] the staff of the Senate Commerce Committee, headed by Chief Counsel Michael Pertschuk, began to explore the feasibility of omnibus product safety legislation.[13] They concluded that legislation to establish a product safety commission was not then "politically ripe"[14] but that a study commission, responsible for holding hearings around the country and developing a record of evidence on product hazards, could build sufficient public support for legislation.[15] The staff expected that the study

---

vis the Congress. But by substantially increasing public participation in the CPSC's proceedings, the procedures created a more open and a more political process that did bear some resemblance to the legislative process on Capitol Hill.

[10] Consumer Product Safety Amendments of 1981, Pub. L. No. 97-35, 95 Stat. 703.

[11] During the last Congress, the Senate approved legislation that would have added to the procedural requirements for informal rulemaking under the Administrative Procedure Act. *See* S. 1080, 97th Cong., 1st Sess., 128 CONG. REC. S2713 (daily ed. Mar. 24, 1982). A retrospective look at the CPSC's implementation and use of its innovative rulemaking procedures should be helpful to those now proposing major, government-wide reform of the rulemaking process.

[12] For a description of some of the statutes enacted in this period, see *infra* notes 40-43 and accompanying text.

[13] Address by Michael Pertschuk, The Rise and Pause of the Consumer Movement: Political Strategies of Regulation and Deregulation, School of Business Administration, University of California at Berkeley 76-77 (Nov. 4, 1981).

[14] *Id.* at 77. The documentation of product-related injuries and public awareness of the risks were insufficient to establish the necessary base of public support for immediate legislation. *Id.*

[15] *Id.* As expected, by the time the National Commission on Product Safety (NCPS) issued its report, its efforts had developed public acceptance of the need for legislation and the legitimacy of an independent product safety commission. *Id.*

commission's deliberations "would lead inexorably to a legislative proposal for the creation of a permanent consumer product safety commission, with full authority to set product safety standards and to order recalls."[16] Their well-developed political instincts proved correct.

In 1967, with little opposition from business, Congress passed a joint resolution establishing the National Commission on Product Safety (NCPS).[17] The NCPS was to conduct a comprehensive study of consumer product hazards and the need for new measures to reduce product-related consumer injuries. The seven-member bipartisan group, which included Michael Pertschuk, conducted an exhaustive two-year study[18] and in 1970 issued its Final Report.[19] Its major findings were that consumers were excessively exposed to unreasonable product hazards and that existing measures to reduce those hazards — industry self-regulation; federal, state or local statutes; and common-law product liability suits — were inadequate.[20] The NCPS recommended that a new federal independent agency be created with broad regulatory authority, including the power to set uniform safety standards for consumer products.[21] Only one NCPS member expressed any reservation about the promotion of mandatory federal safety regulations as the primary solution to the product safety problem.[22]

1. *Findings of the NCPS*

The NCPS painted a dismal picture of the product hazards in the marketplace. It found that about twenty million people were injured every year as a result of incidents in and around the home, at a cost of over $5.5 billion.[23] These figures were dramatic but also somewhat misleading, for they far exceeded the number of injuries arising from unreasonably hazardous products that could be prevented by any regulatory scheme.[24] They were, however, the figures most often cited to support the need for product safety legislation.[25]

---

[16] *Id.* at 78.

[17] Joint Resolution to Establish a National Commission on Product Safety, Pub. L. No. 90-146, 81 Stat. 466 (1967).

[18] The NCPS contracted for studies; had products tested; consulted with experts, industrial leaders, and consumer representatives; and heard from over 200 witnesses during 22 days of formal hearings. The hearing record of over 7000 pages was published in 10 volumes as the NATIONAL COMMISSION ON PRODUCT SAFETY HEARINGS (1970).

[19] NATIONAL COMM'N ON PROD. SAFETY, FINAL REPORT PRESENTED TO THE PRESIDENT AND CONGRESS (1970) [hereinafter cited as NCPS FINAL REPORT].

[20] NCPS FINAL REPORT, *supra* note 19, at 1-3.

[21] *Id.* at 113-19.

[22] Commissioner Hugh L. Ray, Director of Merchandise Development and Testing Laboratory of Sears, Roebuck & Company, thought that the primary federal role in the area of product safety should be to gather injury data and to trigger voluntary industry efforts or cooperative government-industry efforts to develop safety standards. In a somewhat oblique fashion, he suggested that the NCPS had lost its perspective and overreacted to the household injury problem as a result of its exposure to the "tragedy of a personal injury" in the many individual cases it studied. Further, Comm'r Ray implied that the Report could mislead the public by suggesting that most household injuries would be eliminated if federal product safety standards were promulgated. *Id.* at 120-21.

[23] *Id.* at 9. An estimated 30,000 people were killed and 110,000 were permanently disabled. The NCPS reported that "most of these casualties [were] associated with consumer products." *Id.* The NCPS derived its data from the National Center for Health Statistics of the Department of Health, Education, and Welfare (HEW) (now called the Department of Health & Human Services), and the National Safety Council. *Id.*

The NCPS identified sixteen product categories which presented unreasonable hazards that warranted federally imposed safety standards.[26] It also listed eighteen other product categories that needed further investigation.[27] The NCPS proposed the development of industry-wide product safety standards[28] that would not only make products safe for normal use but would alert consumers to risks arising from their own product misuse.[29]

The NCPS believed that industry self-regulation was an unsatisfactory alternative to government intervention.[30] It found that existing industry standards were inadequate in scope,[31] safety levels,[32] and developmental procedures.[33] Standard-setting groups did not provide for adequate consumer participation[34] and could not exercise independent judgment because they were supported largely by the companies whose products would be regulated.[35] Standards set in this environment generally were based on industry-wide consensus[36] and thus set a bare minimum safety level.

---

[24] The first CPSC Chairman, Richard O. Simpson, estimated that between 15 and 25% of the 20 million product-associated injuries were "product-caused, or 'standards-preventable.' " *Regulatory Reform, Consumer Product Safety Commission, National Highway Traffic Safety Administration, Federal Trade Commission: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce,* 94th Cong., 2d Sess. 4 (1976) [hereinafter cited as *1976 House Reform Hearings*]. NCPS Chairman Arnold B. Elkind gave a "gut estimate" that 20% of the injuries could be prevented by improving product safety. 118 CONG. REC. 31,383 (1972) (remarks of Rep. McCollister, quoting from a statement of Mr. Elkind), *reprinted in* BNA, *supra* note 2, at app. 275.

[25] For example, congressional studies often quoted the NCPS figures as representative of the product safety problem. *See, e.g.,* S. REP. NO. 749, 92d Cong., 2d Sess. 2 n.2 (1972), *reprinted in* BNA, *supra* note 2, at app. 61, 62 n.2; H.R. REP. NO. 1153, 92d Cong., 2d Sess. 21 (1972), *reprinted in* BNA, *supra* note 2, at app. 211, 212.

[26] In alphabetical order, the product categories were: architectural glass, color television sets, fireworks, floor furnaces, glass bottles, high-rise bicycles, hot-water vaporizers, household chemicals, infant furniture, ladders, power tools, protective headgear, rotary lawn mowers, toys, unvented gas heaters, and wringer washing machines. NCPS FINAL REPORT, *supra* note 19, at 12-34.

In evaluating whether hazards were unreasonable, the NCPS considered a number of factors, including the severity and frequency of injuries (taking into account levels and frequency of exposure to the product), the extent of abnormal use, the nature of the user population, and the feasibility and cost of reducing the risks. *Id.* at 10.

[27] Among the products requiring further study were electric blankets, dryers, hot plates, bathtubs, extension cords, igniters, space heaters, lead paint, propane gas, footwear, welders, eyeglasses and frames, swimming pools, recreational equipment, boats, automatic washers, aerosol containers, and cosmetics. *Id.* at 35-36. The total list of product categories subject to the NCPS's interest grew from 250 to 350 during the course of its study. *Id.* at 35.

[28] One of the central themes recurring throughout the NCPS FINAL REPORT was the desirability of preventive mandatory standards. One of three key recommendations was to vest the new federal agency with standard-setting authority. *Id.* at 7. The other two key recommendations were that the agency be independent and that a consumer safety advocate be placed within the agency to represent the consumer. *Id.*

[29] The NCPS recommended standards where injuries arose primarily from consumer misuse, for example, for glass doors, *id.* at 13, and ladders, *id.* at 25-26. Even when the NCPS had not developed concrete injury data, it recommended standards, for example, for storm doors and shower bath panels. *Id.* at 12.

[30] *Id.* at 59, 62.

[31] Of the 44 product categories with the highest injury rates, more than half did not have industry-wide voluntary standards. *Id.* at 48.

[32] The NCPS studied voluntary safety standards for seven product categories and found each deficient in many aspects. *Id.* at 48-51.

The NCPS also found product liability litigation and state and local laws to be important but insufficient deterrents to the manufacture or sale of unreasonably hazardous products.[37] Consumer protection efforts at state and local levels were inherently incapable of setting the nationwide safety standards the NCPS thought necessary.[38] Additionally, such efforts were hampered by small budgets, diffuse and narrow jurisdictions, and ineffective administration.[39]

Finally, the NCPS studied and found wanting the existing federal safety statutes. Too many narrowly drawn statutes were scattered through the books, enacted on a product-by-product or risk-by-risk basis, as their titles reflected: the Flammable Fabrics Act;[40] the Refrigerator Safety Act;[41] the Federal Hazardous Substances Labeling Act;[42] and the Child Protection Act.[43] During the NCPS's study, and at the urging of the NCPS which felt that children should be protected by legislation as quickly as possible, Congress enacted two additional narrowly focused statutes: the Child Protection and Toy Safety Act[44] and the Poison Prevention Packaging Act of 1970.[45]

---

[33] *Id.* at 51-57, 62.

[34] The NCPS found that industry members dominated standards development and that consumers had a very limited role in the process. *See id.* at 52-56. The NCPS observed, however, the difficulty of finding competent consumer representatives with the time and resources to serve on standards committees, whose work is time consuming and comprehensive. *Id.* at 52.

[35] *Id.* at 53-54. For example, the American National Standards Institute (ANSI) received half of its income from membership dues, 80% of which came from companies whose products complied with ANSI standards. *Id.* at 53.

[36] *Id.* at 52. In order to promote "maximum acceptance" of standards — since their success largely depends on voluntary compliance — standards organizations seek approximately 80% acceptance of standards by substantially concerned organizations before promulgating them. *Id.* The NCPS also found fault with the voluntary nature of industry self-regulation. Standards groups could not enforce standards with any clout because enforcement potentially would violate the antitrust laws. *Id.* at 58-59.

[37] The NCPS found that because of the high cost of litigation, consumers brought suits only in major injury cases, those involving claims of at least $5000 to $10,000. *Id.* at 74. The NCPS found that the consumer is disadvantaged even in such cases, primarily because corporate defendants can marshal enormous resources to defend suits. *Id.* at 73. Court delays also discourage plaintiffs and give sellers an advantage, and certain defenses may completely bar plaintiffs' recovery. *Id.* at 79. These factors may combine to reduce the incentive for manufacturers to improve product safety. Further, the NCPS found that claims arise only after injuries occur and thus do not serve the essential goal of preventing dangerous products from reaching the market. *Id.* at 74.

[38] State and local regulations are obviously limited by jurisdictional boundaries and cannot affect the design and production of products outside their reach. *Id.* at 81. The NCPS found, however, that state and local laws can be useful to regulate product sales, repairs, and installation within their respective jurisdictions. *Id.* at 81, 88. Also, state and local agencies can play useful roles in educating consumers and in assuring compliance with safety laws. *Id.* at 81.

[39] *Id.* at 81-88.

[40] Ch. 164, 67 Stat. 111 (1953) (codified as amended at 15 U.S.C. §§ 1191-1204 (1976 & Supp. V 1981)).

[41] Ch. 890, 70 Stat. 953 (1956) (codified as amended at 15 U.S.C. §§ 1211-1214 (1976)).

[42] Pub. L. No. 86-613, 74 Stat. 372 (1960) (codified as amended at 15 U.S.C. §§ 1261-1276 (1976 & Supp. V 1981)). The statute was enacted to prevent injuries from toxic, corrosive, flammable, and otherwise hazardous products principally by requiring precautionary labeling on the package or container. For a history of this legislation, see H. Heffron, Federal Consumer Safety Legislation 163-66 (1970) [hereinafter cited as Heffron Report].

These statutes failed to provide a comprehensive approach to product safety. The NCPS identified roughly 350 product categories that were outside the scope of existing statutory authority.[46] Enforcement responsibilities under the statutes were scattered among different federal agencies.[47] Some statutes provided rulemaking authority to set safety standards, others did not;[48] where rulemaking authority existed, procedures varied from informal notice and comment rulemaking to formal quasi-adjudication.[49] Enforcement powers also varied.

---

[43] Pub. L. No. 89-756, 80 Stat. 1303 (1966) (codified as amended at 15 U.S.C. §§ 1261-1265, 1273 (1976 & Supp. V 1981)). The statute amended the Federal Hazardous Substances Labeling Act to give the Secretary of HEW the additional authority to ban substances from the market that could not be made reasonably safe through precautionary labeling. Toys containing hazardous substances presenting an imminent hazard could be banned automatically pending completion of agency proceedings. 15 U.S.C. § 1261(q)(2) (1970).

[44] Pub. L. No. 91-113, 83 Stat. 187 (1969) (codified at 15 U.S.C. §§ 1261-1262, 1274 (1976)). The statute further amended the Federal Hazardous Substances Act (FHSA), formerly the Federal Hazardous Substances Labeling Act, by, *inter alia,* allowing the Secretary of HEW to ban toys presenting electrical, thermal, or mechanical hazards. Pub. L. No. 91-113, § 2(c), 83 Stat. 187, 187 (1969) (codified as amended at 15 U.S.C. § 1261(q)(1) (1976)).

[45] Pub. L. No. 90-601, 84 Stat. 1670 (1970) (codified as amended at 15 U.S.C. §§ 1471-1474, 1476 (1976 & Supp. V 1981)). The statute allowed the Secretary of HEW to establish special packaging standards for household substances that presented hazards to children. 15 U.S.C. § 1472(a) (1970).

[46] NCPS FINAL REPORT, *supra* note 19, at 89-92.

[47] The Department of Commerce set standards under the Refrigerator Safety Act, 15 U.S.C. § 1213 (1970) (amended 1972). The Department of HEW was responsible for enforcing the FHSA, *id.* § 1261(c)-(d) (amended 1972), and the Poison Prevention Packaging Act (PPPA), *id.* § 1471(1) (amended 1972). Under the Flammable Fabrics Act (FFA), the Commerce Department and HEW shared investigative duties, *id.* § 1201 (amended 1972), the Commerce Department had rulemaking authority, *id.* § 1193 (amended 1972), the Federal Trade Commission (FTC) had domestic enforcement, *id.* § 1194 (amended 1972), and the Treasury Department had enforcement authority over imports, *id.* § 1198. As a consequence, the agencies expended enormous effort on liaison activities, yet one agency could forestall actions by another. Funding levels from different congressional committees also resulted in different priorities among the agencies. NCPS FINAL REPORT, *supra* note 19, at 97.

[48] The Commerce Department had standard-setting authority under the FFA but was limited to establishing flammability levels. 15 U.S.C. § 1193(a) (1970) (amended 1972). The Department of HEW could set standards under the PPPA only for the packaging of products, not the products themselves. *Id.* § 1472 (amended 1972). The FHSA provided no authority to set performance or design standards for products, although it did authorize HEW to ban products from the market. *Id.* § 1261(q)(2) (amended 1972). The NCPS viewed the banning authority as an "all-or-nothing" approach that provided an agency with little flexibility for addressing product safety problems. NCPS FINAL REPORT, *supra* note 19, at 92. In fact, however, the banning authority has proved to be a flexible regulatory tool. The CPSC has used it creatively under both FHSA and CPSA, in effect to set product safety standards by banning products that fail to meet specified safety requirements. *See, e.g.,* 16 C.F.R. §§ 1512.1-1512.20 (1982) (ban under FHSA on bicycles that do not meet specified requirements); *id.* §§ 1301.1-1301.8 (ban under CPSA on refuse bins that do not meet specified requirements). *See generally infra* text accompanying notes 254-78 (discussion of Commission use of banning authority).

[49] Under the FHSA, Congress required the administering agency to use formal

Some statutes included strong enforcement tools such as the power to ban products from the market[50] or to require manufacturers to repurchase faulty products;[51] others authorized only mild cease and desist orders.[52] In sum, the statutory schemes amounted to a hodgepodge of inconsistent mandates, administrative procedures, and enforcement tools.

The NCPS also found several problems in the implementation of the statutes. Some agencies had contributed to their own ineffectiveness. A special report prepared for the NCPS found that the implementation of federal safety laws was "marked by too much timidity and inordinate delay."[53] This study was especially critical of the Food and Drug Administration (FDA) for its slow and limited use of its enforcement authority under the Federal Hazardous Substances Act.[54] It also criticized as unnecessary and time-consuming the two-tiered rulemaking procedures that the Department of Commerce adopted under the Flammable Fabrics Act.[55] The NCPS concluded

---

rulemaking procedures to declare products hazardous. 15 U.S.C. §§ 1261(q)(2), 1262(a) (1970). It could use informal procedures to establish regulations requiring cautionary labeling in addition to that labeling required by statute. *Id.* § 1262(b). It could use either formal or informal procedures to ban certain toys. *Id.* § 1262(e)(1). The PPPA permitted a choice between formal or informal procedures, *id.* § 1474(a), as did the FFA, *id.* § 1193(d) (amended 1976).

[50] *See supra* note 43 and accompanying text.

[51] *E.g.,* 15 U.S.C. § 1274 (1970). The FHSA repurchase provisions, however, were applicable only to banned hazardous products. *Id.* Other remedies under the FHSA were similar to those available under the FFA, including criminal penalties, injunctions and seizures, and condemnations. *Id.* §§ 1264-1265, 1267.

[52] The FFA was enforced by the FTC which traditionally had used the cease and desist order as its principal enforcement tool. The FFA also provided, however, for court-ordered seizures, condemnations, and criminal penalties. *Id.* §§ 1195(b), 1196.

[53] Heffron Report, *supra* note 42, at 2. The in-depth study covered the scope and adequacy of automobile safety, flammable fabrics, and hazardous substances programs. *Id.* at 7.

[54] *See id.* at 175-200. The Food and Drug Administration (FDA) had used its authority to ban products only twice in the first four years it had such authority. The products involved were X-33, a basement waterproofing paint whose solvent had a flash-point of 40 degrees Fahrenheit below zero, and carbon tetrachloride, a highly dangerous poisonous chemical used in household cleaners. In both cases the products had long been recognized as extremely hazardous, but in neither case did the FDA ban the product pending a formal order. The FDA had argued that congressional intent was unclear as to the appropriate circumstances in which to invoke interim bans, but the Heffron Report suggested that the power should have been used in these cases in keeping with the consumer-oriented purpose of the statute. *Id.* at 180.

It took over two years to ban carbon tetrachloride because an industry group objected to the proposed banning order, thus staying the ban until completion of a trial-type hearing. The FDA took eight months to prepare for the hearing, and changes in personnel and illness caused further delays. *Id.* at 184-85. Despite the fact that the evidence was "overwhelmingly documentary," the FDA compiled a record "so massive that it would seem FDA construe[d] 'substantial evidence' to mean 'overwhelming evidence.' " *Id.* at 187. There seemed little reason for this exhaustive and time-consuming effort since the hazards associated with the product were considered "virtually common knowledge." *Id.* at 185.

[55] *Id.* at 125-30. Although the statute did not require two proceedings, Commerce Department procedures did. The first stage required publication of a notice to determine whether a standard "may be needed to protect the public." 15 C.F.R. §§ 7.5-7.6(a) (1970) (current version at 16 C.F.R. § 1607.6 (1982)). Following a period of 30 days for public comment, the agency could either conclude there was no need for a standard or initiate a rulemaking proceeding on a proposed flammability standard. *Id.* §§ 7.7 (current version at 16 C.F.R. § 1607.9 (1982)), 7.8(a) (current version at 16 C.F.R. § 1607.9 (1982)). The regulations required an oral hearing upon request during the second phase of the rulemaking procedure. *Id.* § 7.9(a) (current version at 16 C.F.R. § 1607.10 (1982)). In the NCPS's view, these procedures were at least partially responsible for

the second requirement was dropped;[61] the first and third remained largely intact.

B. The Consumer Product Safety Act

Within two years after the NCPS issued its Final Report, Congress enacted the Consumer Product Safety Act.[62] It created the Consumer Product Safety Commission[63] and gave it an expansive jurisdiction covering virtually all articles used by consumers in their homes, schools, or recreational activities.[64] Congress also transferred to the Commission enforcement responsibility for existing safety statutes that the adoption of streamlined, informal rulemaking procedures in the new legislation would correct such deficiencies and assure prompt standard promulgation — a conclusion that was not entirely warranted by the record.[56]

---

[61] The House Commerce Committee dropped the consumer advocate provision, apparently on the ground that separate legislation treated consumer participation. BNA, *supra* note 2, at 30. The Senate Commerce Committee provided for appointment of counsel to represent the consumer interest in rulemaking proceedings but indicated that if a separate consumer advocacy agency were created, the provision would be unnecessary. S. REP. NO. 749, 92d Cong., 2d Sess. 19 (1972), *reprinted in* BNA, *supra* note 2, at app. 61, 78. The Senate Labor Committee during its consideration of the bill discarded the consumer advocate provision. S. REP. NO. 835, 92d Cong., 2d Sess. 12-13, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4573, 4585, *and in* BNA, *supra* note 2, at app. 117, 128. The separate consumer advocacy agency was never created. *See* Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act,* 20 U.C.L.A. L. REV. 899, 902 (1973).

[62] Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified as amended at 15 U.S.C §§ 2051-2083 (1976 and Supp. V 1981)).

[63] Pub. L. No. 92-573, § 4(a), 86 Stat. 1207, 1210 (codified as amended at 15 U.S.C. § 2053(a) (Supp. V 1981)). The NCPS had strongly recommended that the product safety statute create a new independent agency. In its view, an independent agency would make product safety its number one priority and be more vigorous in addressing controversial issues and enforcing its statute. Its independent status would make the agency more visible to industry — thereby stimulating voluntary safety improvements — and to the general public and Congress — thereby maintaining broad awareness of funding and staff needs. NCPS FINAL REPORT, *supra* note 19, at 56.

During congressional consideration of the proposed safety legislation, considerable controversy arose over whether product safety regulation should be consolidated within a single independent agency or in an executive agency. Indeed, probably no other single issue received as much congressional attention as the executive versus independent agency dispute, involving as it did a political tug-of-war between the Democratic Congress and the Republican President. The Nixon administration favored the establishment of a Consumer Safety Administration within the Department of Health, Education, and Welfare. *See* S. 1797, 92d Cong., 1st Sess. § 2, 117 CONG. REC. 13,825 (1971); H.R. 8157, 92d Cong., 1st Sess. § 3, *reprinted in Consumer Product Safety Act, 1972: Hearings on H.R. 8110, H.R. 8157, H.R. 260 (and identical bills) Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce,* 92d Cong., 1st Sess. 35 (1972); *see also Consumer Product Safety Act of 1971: Hearings on S. 1797 Before the Senate Comm. on Commerce,* 92d Cong., 1st Sess. 95 (1971) (letter from President Richard M. Nixon to Sen. Warren G. Magnuson supporting the proposal). Both Houses of Congress ultimately adopted the independent agency structure, though in significantly different forms.

The bill eventually passed by the Senate would have created an independent Food, Drug, and Consumer Product Safety Agency, headed by a single administrator with four Commissioners (of Food and Nutrition, Drugs, Veterinary Medicine, and Consumer Products) responsible for, among other things, promulgating product safety standards. S. 3419, 92d Cong., 2d Sess. §§ 103, 107, 118 CONG. REC. 21,903, 21,903-04 (1972). The House-passed bill created a five-member Consumer Product Safety Commission without the FDA's authority. H.R. 15,003, 92d Cong., 2d Sess. § 4(a) (1972). The House version was ultimately adopted.

[64] The Act covers "consumer products," defined as:

> [A]ny article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise . . . .

15 U.S.C. § 2052(a)(1) (Supp. V 1981).

2. *Recommendations*

The NCPS proposed legislation designed to close the gaps in existing safety statutes and to correct their procedural and remedial shortcomings.[57] The NCPS stressed the critical nature of three requirements of its proposal: (1) an independent agency with a broad mandate,[58] (2) a Consumer Safety Advocate to represent the interests of consumers in the agency's decision-making processes,[59] and (3) a wide range of enforcement tools, including the authority to set mandatory product safety standards.[60] During the legislative process

---

the fact that no flammability standards were even proposed until 1970, although the Department had standard-setting authority since 1967. NCPS FINAL REPORT, *supra* note 19, at 94.

Ironically, the two-tiered procedure, considered cumbersome and unnecessary by the NCPS, bears some resemblance to the two-step procedures recently mandated by the 1981 CPSA amendments that require an advance notice of proposed rulemaking, with an opportunity for public comment, before a proposed rule can be published. *See infra* text accompanying notes 280, 283.

[56] *See* NCPS FINAL REPORT, *supra* note 19, at 93. The NCPS seemed to have a somewhat uncritical view of informal rulemaking. It attributed, for example, the many initial automobile safety standards promulgated quickly under the National Highway and Traffic Safety Act to the informal procedures available under the statute. *Id.* It had failed to note, however, that the statute controlled the timing of standards, and also required the standards to be based upon existing motor vehicle safety standards. 15 U.S.C. § 1392(h) (1970). In short, the standards were already largely in effect in the marketplace and their prompt issuance could hardly be attributed to the advantages of informal procedures.

Furthermore, the flammable fabric standards' delayed issuance was not caused solely by cumbersome procedures. Not discussed by the NCPS, but also contributing to the delay, was the Commerce Department's overly ambitious initial effort to develop a single standard for all wearing apparel. HEFFRON REPORT, *supra* note 42, at 138-41. This approach proved unworkable and the Department later undertook the more manageable task of devising a standard for children's clothing only. *Id.* at 137, 143. The problem of overly broad initial rulemaking efforts, which was not addressed by the NCPS, would arise again under its recommended approach to safety regulation. *See infra* notes 229-64 and accompanying text.

In its enthusiasm, the NCPS also failed to mention past congressional restraints on vigorous rulemaking by regulatory agencies. One of the few agencies the NCPS praised for its rulemaking initiatives was the FTC for its "admirable vigor in proceeding against the health hazards of cigarettes." NCPS FINAL REPORT, *supra* note 19, at 5. The NCPS failed to note, however, that Congress effectively overruled the FTC's "admirable" initiative before it promulgated its final rule on cigarette advertising and labeling. *See* Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 7, 84 Stat. 87, 89 (1970) (codified at 15 U.S.C. § 1336 (1976)).

[57] Proposed Consumer Product Safety Act, *reprinted in* NCPS FINAL REPORT, *supra* note 19.

[58] NCPS FINAL REPORT, *supra* note 19, at 5.

[59] *Id.* at 6.

[60] *Id.* at 6-7. The NCPS wanted the proposed agency to avoid unnecessary intervention in private enterprise but also to have the authority to set safety standards, both to encourage voluntary standards and to use where no adequate private standards were developed. *Id.*

covering flammable fabrics, toys, hazardous substances, and the packaging of hazardous substances.[65] In all, an estimated ten thousand consumer products[66] and over a million producers and sellers of such products came under the CPSC's jurisdiction.[67] The jurisdiction of the new agency was limited only by the statute's specific exclusion of products such as foods; drugs and automobiles, which were already subject to comprehensive federal safety statutes;[68] and tobacco and firearms.[69]

In addition to broad product coverage, Congress gave the Commission a broad range of enforcement tools. The Commission's administrative powers included standard setting to reduce "unreasonable risks of injury;"[70] product bans where no safety standard would be feasible;[71] and product recalls, including replacement, refund, or repair of products that present "substantial" hazards to consumers.[72] For products posing especially serious hazards, Congress authorized the Commission to seek judicial orders of seizure and condemnation,[73] and specific injunctive relief mandating such actions as public notification of hazards, recalls, and repair or replacement.[74] The new statute provided a jurisdiction broad enough to cover the products that the NCPS had found outside the reach of the existing narrowly drawn statutes[75] and gave the Commission a complete range of enforcement tools that those statutes had not provided.[76]

In the aftermath of the statute's enactment, expectations for the new agency were very high. It was thought to be "the most powerful

---

[65] The transferred statutes were the Federal Hazardous Substances Act, the Flammable Fabrics Act, the Poison Prevention Packaging Act, and the Refrigerator Safety Act. *Id.* § 2079(a)-(c) (1976); *see also supra* notes 40-52 and accompanying text (discussion of the diffusion of regulatory responsibility and the resultant NCPS criticism).

[66] PSL BRIEFING CONFERENCE, *supra* note 2, at 8. By 1981, the number of products covered by the CPSC was estimated at between 10,000 and 15,000. *CPSC Reauthorization: Hearings on H.R. 2271 and 2201 Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce,* 97th Cong., 1st Sess. 38 (1981) (testimony of former CPSC Chairman Susan B. King) [hereinafter cited as *1981 House Hearings*].

[67] *1981 House Hearings, supra* note 66, at 38 (testimony of former CPSC Chairman Susan B. King).

[68] 15 U.S.C. § 2052(a)(1)(C), (H), (I) (1976). Other exempt products include aircraft, boats, and cosmetics. *Id.* § 2052(a)(1)(F)-(H).

[69] *Id.* § 2052(a)(1)(B), (E).

[70] *Id.* §§ 2051(b)(1), 2056(a). A product safety standard could set performance or design standards and/or specify warnings or instructions. *Id.* § 2056(a)(1) (amended 1981).

[71] *Id.* § 2057 (Supp. V 1981).

[72] *Id.* § 2064(c)-(d) (1976).

[73] *Id.* § 2061(a)(1), (b)(2).

[74] *Id.* § 2061(a)(2), (b)(1). Congress also provided judicial remedies, including civil and criminal penalties, injunctions, and product seizures for violations of Commission rules or other provisions of the CPSA, as defined by 15 U.S.C. § 2068. *Id.* §§ 2069-2071.

[75] *See supra* note 46 and accompanying text.

[76] *See supra* notes 47-52 and accompanying text.

Federal regulatory agency ever created."[77] Newly appointed CPSC Commissioners helped sustain these expectations with early public statements expressing their intention to use the full range of powers available, including criminal sanctions.[78] The Commission's first Chairman, Richard O. Simpson, forecast the completion of about one hundred mandatory standards between 1977 and 1982.[79]

In reality, the Commission did not have the enforcement capabilities the statute seemed to provide, for Congress gave it neither the budget nor the staff to fully exploit its powers.[80] It was — and remains — the smallest federal health and safety agency — about one-tenth the size of the Environmental Protection Agency, one-seventh the size of the Food and Drug Administration, and one-third the size of the Occupational Health and Safety Administration.[81]

The combination of broad apparent statutory authority and limited real capabilities posed a dilemma for the Commission, particularly in its early years. Its budget constraints created the need for a careful development of a limited number of priorities, and the most effective possible use of resources. This challenge was particularly great for an inexperienced agency like the CPSC, with a new statute to enforce.[82]

---

[77] Swit, *An Overview of Public Law 92-573,* PSL Briefing Conference, *supra* note 2, at 7.

[78] *See, e.g.,* Address by Richard O. Simpson Before the Consumers Union, Iowa Consumers League Annual Meeting (Oct. 13, 1973), *reprinted in Agriculture — Environmental and Consumer Protection Appropriations for 1975: Hearings Before the Subcomm. on Agriculture — Environmental and Consumer Protection of the House Comm. on Appropriations,* 93d Cong., 2d Sess. 1064, 1067 (1974) [hereinafter cited as *1975 House Appropriations Hearings*]; Gardner, *Consumer Report — New Product Safety Commission Adopts "Tough But Reasonable" Approach to Its Job,* Nat'l J. Rep. 1393, 1393-94 (Sept. 22, 1973) (quoting statements of Chairman Simpson, Vice Chairman Franklin, Comm'r Kushner, and Director of Public Affairs Eisenberg), *reprinted in 1975 House Appropriations Hearings, supra,* at 1067, 1070.

[79] Chairman Simpson estimated that these standards would address approximately 75% of the preventable risks attributable to unsafe products and would require an annual average appropriation of $72 million. *1976 House Reform Hearings, supra* note 24, at 23-31.

[80] The Nixon administration never sought the level of funding originally thought necessary to implement the CPSA. For each of the fiscal years 1975 through 1977, it sought $37 million, and it projected the same amount of annual funding through 1981. *Id.* at 64. The Senate Commerce Committee had originally estimated the cost of implementing its proposed bill at $180 million in the first year and increasing each year to $250 million in the fourth and fifth years. S. Rep. No. 749, 92d Cong., 2d Sess. 41 (1972), *reprinted in* BNA, *supra* note 2, at app. 61, 101. The House Committee's estimates were considerably lower, but still much higher than those sought by the administration — $55 million in the first year and increasing to $65 million in the fourth and fifth years. H.R. Rep. No. 1153, 92d Cong., 2d Sess. 53 (1972), *reprinted in* BNA, *supra* note 2, at app. 211, 244.

[81] The relative size of safety agencies is reflected in the following 1977 figures:

Agency	Budget	Staff
CPSC	$ 39 million	900
FDA	$276 million	7,500
OSHA	$130 million	2,700
EPA	$ 1 billion	10,200

Implementation of the CPSA: Hearings Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science, and Transportation, 95th Cong., 1st Sess. 7 (Oct. 1977) (testimony of S. John Byington, CPSC Chairman) [hereinafter cited as *Oct. 1977 Senate Oversight Hearings*]. The CPSC's 1982 budget was reduced to $33 million. 1982 CPSC Ann. Rep. 3.

[82] "[Any new agency] lacks administrative experience, its policy and objectives are vague or unformed, its legal powers are unclear and untested and its relations with the Congress are uncertain." *Id.* at 79.

The Commission's ability to meet this challenge depended largely on the effectiveness of its procedural tools. But as it turned out, those tools only exacerbated the difficulties the Commission encountered in its early years. I now turn to an examination of these procedures, studying first the petitioning process and then the standards development process.

II. Petitioning Process Under the CPSA

A. Background

Under the Administrative Procedure Act (APA), petitioners' rights are quite limited. Interested persons may petition for the issuance, repeal, or amendment of rules,[83] but are entitled only to "prompt notice" of petition denials and "a brief statement of the grounds for denial."[84] Judicial review of petition denials is confined to the narrow "arbitrary and capricious" test.[85]

Section 10 of the CPSA, which governed petitions for the issuance, amendment, or revocation of consumer product safety standards and bans,[86] gave petitioners greater rights than those under the APA.[87]

---

[83] 5 U.S.C. § 553(e) (1976).

[84] *Id.* § 555(e).

[85] *Id.* § 706(2)(a); *see* WWHT, Inc. v. FCC, 656 F.2d 807, 809, 817 (D.C. Cir. 1981) (holding that the denial of a petition is reviewable and applying the arbitrary and capricious standard of review). An earlier view was that denials of petitions were not reviewable at all. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 39 (1947).

[86] 15 U.S.C. § 2059 (1976) (repealed 1981). The petition for issuance of a rule was to set forth facts to show that a rule was necessary and to describe briefly what the nature of the proposed rule should be. *Id.* § 2059(b) (repealed 1981).

[87] Section 10 was the product of the Conference Committee's compromise between widely divergent House and Senate bills. H.R. CONF. REP. NO. 1593, 92d Cong., 2d Sess. 12-13, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4596, 4606-07, *and in* BNA, *supra* note 2, at app. 311, 326-27. To the Senate architects of the CPSA, the APA provisions were inadequate. In their view petitioners should have been given more clout to help assure that the CPSC did not succumb to "bureaucratic inertia." *See, e.g.,* 118 CONG. REC. 21,854 (1978), *reprinted in* BNA, *supra* note 2, at app. 156. ("The [petitioning provision] grants citizens in this country the right to overturn bureaucratic inertia in a court of law by showing, through a preponderance of the evidence, that the bureaucracy has failed in its mission to protect consumers from unsafe foods, drugs or other consumer products.") (remarks of Sen. Magnuson); *id.* at 21,876, *reprinted in* BNA, *supra* note 2, at app. 162 ("[T]his departure from the [APA] is justified by the nature of the right involved.") (remarks of Sen. Kennedy).

The Senate bill, therefore, granted to petitioners who had been exposed to an unreasonable risk from a consumer product the right to sue the CPSC in a federal court of appeals if it failed to initiate regulatory action within 120 days of the filing of a petition. S. 3419, 92d Cong., 2d Sess. § 112 (1972), *reprinted in* BNA, *supra* note 2, at app. 193, 197. The court was empowered to review the Commission's decision and remand the matter to the Commission for appropriate action. *Id.* § 112(b)-(c), *reprinted in* BNA, *supra* note 2, at app. 197. The Senate Labor Committee did not expect that a large number of such suits would be filed and thereby "disturb the orderly processes of Agency decision [making]," S. REP. NO. 835, 92d Cong., 2d Sess. 14 (1972), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4573, 4587, *and in* BNA, *supra* note 2, at app. 117, 131, but hoped that the availability of the lawsuit would serve as a "constant spur to action safeguarding the public," *id., reprinted in* 1972 U.S. CODE CONG. & AD. NEWS at 4587, *and in* BNA, *supra* note 2, at app. 131. The Committee anticipated that few suits would

Section 10(c) authorized the Commission to hold public hearings and to conduct product hazard investigations in response to petitions,[88] and section 10(d) set a deadline of 120 days in which the Commission was to grant or deny a petition.[89] Upon granting a petition, the Commission was to "promptly commence" proceedings either to ban the product or to develop a safety standard.[90] If the Commission denied the petition, it was to publish its reasons for denial in the *Federal Register.*[91]

Section 10(e)[92] provided that upon the Commission's denial of a petition or failure to act within the 120-day period the petitioner could bring a civil action in a federal district court to compel the Commission to initiate a proceeding.[93] The court would consider *de novo* the petition denial. The petitioner would have to prove by a preponderance of the evidence that a consumer product presented an unreasonable risk of injury and that failure to initiate a proceeding for a standard or a product ban would expose the petitioner or other consumers to an unreasonable risk of injury.[94] If the petitioner were successful, the court could order the Commission to initiate a proceeding, though it could not order the CPSC to accept a particular standard or ban.[95]

Members of the Conference Committee, concerned that this unique judicial review provision would allow petitioners to interfere with the Commission's work, inserted in the final bill the requirement that the judicial review provision not take effect until three years after enactment of the legislation.[96] This delay was to give the Commission the "opportunity in the first years of its existence to

---

be filed since the right of action gave plaintiffs no economic incentive other than the costs of the suit. *Id., reprinted in* 1972 U.S. CODE CONG. & AD. NEWS at 4587, *and in* BNA, *supra* note 2, at app. 131.

Another provision in the Senate bill permitted petitions for the initiation, amendment, and revocation of product safety standards, with no requirement that petitioners be exposed to risk before petitioning the CPSC. S. 3419, 92d Cong., 2d Sess. § 303(b) (1972), *reprinted in* BNA, *supra* note 2, at app. 193, 201. It required the Commission to publish all petitions in the *Federal Register,* provide an opportunity for public comment, and publish its reasons for petition denials. *Id., reprinted in* BNA, *supra* note 2, at app. 201.

In contrast, the House bill gave few rights to petitioners, largely following the APA model. It contained a single provision that governed only petitions for product safety standards and bans, not regulatory initiatives generally, and afforded no opportunity for public comment. H.R. 15,003, 92d Cong., 2d Sess. § 10 (1970), *reprinted in* BNA, *supra* note 2, at app. 295, 300. It did require that petition denials be published in the *Federal Register,* however. *Id., reprinted in* BNA, *supra* note 2, at app. 300.

[88] 15 U.S.C. § 2059(c) (1976) (repealed 1981).

[89] *Id.* § 2059(d) (repealed 1981).

[90] *Id.* With this provision, the drafters seemed to be contemplating only petitions to initiate action, not those to revoke rules which were also covered by § 10. The drafters apparently looked at petitions primarily as a "spur" to initiate regulation. *See supra* note 87.

[91] 15 U.S.C. § 2059(d) (1976) (repealed 1981).

[92] *Id.* § 2059(e) (repealed 1981).

[93] *Id.* § 2059(e)(1) (repealed 1981). Petitioners were required to file the civil action within 60 days of the denial or within 60 days after the 120-day period expired.

[94] *Id.* § 2059(e)(2) (repealed 1981).

[95] *Id.* § 2059(e)(3) (repealed 1981).

[96] *Id.* § 2059(g) (repealed 1981); H.R. CONF. REP. NO. 1593, 92d Cong., 2d Sess. 48, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4596, 4639, *and in* BNA, *supra* note 2, at app. 311, 327.

properly order its priorities."[97] Congressman Staggers explained that the delay would give the Commission time to study the products identified by the NCPS.[98] Another House member, putting it more colorfully, explained that the three-year delay was necessary to protect the new Commission from being "beleaguered by everyone's pet peeve."[99]

B. Implementation of Section 10

1. Setting Priorities via Petitions

a. The Agency's Reactive Posture

The Commission gave the most attention and deference to petitions in its early years, before the judicial review provisions of section 10(e) took effect.[100] Its approach comported with the Senate view that the petitioning provision was one of the statute's most important provisions — a key to preventing agency lethargy and promoting ongoing agency responsiveness to the public.[101] But it ran counter to the intent behind the House-backed provision delaying *de novo* judicial review, which was designed to diminish the impact of petitions during the Commission's early years.

At the outset, the Commissioners and staff actively solicited petitions and docketed as a petition almost any request submitted to the agency.[102] They similarly encouraged petitions which came not under the CPSA, but under one of the four safety statutes transferred to the Commission.[103] In its first three years, the Commission received over two hundred petitions, fifty-one of which were under the CPSA.[104]

---

[97] 118 CONG. REC. 36,045 (1972) (remarks of Rep. Staggers), *reprinted in* BNA, *supra* note 2, at app. 343.

[98] *Id., reprinted in* BNA, *supra* note 2, at app. 343.

[99] *Id.* at 36,046 (remarks of Rep. Broyhill), *reprinted in* BNA, *supra* note 2, at app. 343.

[100] In its 1975 ANNUAL REPORT, the CPSC characterized its regulatory effort as "primarily a reactive response to petitions received." Although the Commission had identified priority areas under its hazard identification program, it directed regulatory development resources to areas identified by petitions because "Congress mandated that petitions must receive priority attention." 1975 CPSC ANN. REP. 22.

[101] *See supra* note 87 and accompanying text.

[102] Interview with Margaret Freeston, then Acting General Counsel, CPSC, in Bethesda, Md. (Jan. 13, 1982) [hereinafter cited as Freeston Interview]. See, for example, Address by Chairman Richard O. Simpson Before the Consumers Union, Iowa Consumers League Annual Meeting (Oct. 13, 1973), *reprinted in 1975 House Appropriations Hearings, supra* note 78, at 1066, indicating that he hoped the audience would take advantage of § 10 by simply writing a letter "outlining the problem" and asking for relief. He further assured them that such letters would get "very serious consideration." *Id.*

[103] For a listing of these statutes, see *supra* note 65.

[104] CPSC, Petition Log (available in the Office of the Secretary, CPSC, Bethesda, Md.) [hereinafter cited as CPSC Petition Log]. Of the 203 petitions received in the first three fiscal years, the greatest number (69) were filed under the Poison Prevention Packaging Act and most were from industry seeking exemptions from existing regulations. *Id.* at P-1 to P-12. Another 41 were filed under the Flammable Fabrics Act and they also generally sought exemptions from existing regulations. *Id.* at F-1 to F-8. The

The number of CPSA petitions consistently increased during this time, reaching a high of twenty-seven in fiscal year 1975.[105]

Congress never intended that the Commission's priorities be set in response to petitions,[106] nor did the Commission intend that result. Indeed, the Commission very early stated that it would give first priority to products posing the greatest risks, and would act on a "systematic basis rather than in a piecemeal, stopgap fashion."[107] As part of this effort, the Commission developed the Consumer Product Hazard Index (CPHI), which ranked products according to the severity of their risk,[108] and announced that the CPHI would be an "essential component of its priority setting system."[109]

Despite this announced approach, petitions were a very influential factor in the Commission's early decisions to initiate standards development. Out of nine safety standards the Commission decided to initiate under the CPSA in its first three years of existence, it began only two — for television receivers[110] and book matches[111] — without petitions. The remaining seven addressed risks associated with swimming pool slides, architectural glass, power lawn mowers, space heaters, aluminum wiring, extension cords, and tents.[112] Three of these seven ranked high on the CPHI and therefore were already likely candidates for Commission action — architectural glass (10th), power lawn mowers (11th), and space heaters (15th).[113] The other four ranked low or not at all on the CPHI.[114] It is doubtful that in

---

CPSA petitions, on the other hand, sought the initiation of standards, *id.* at C-1 to C-9; as did many of those filed under the Federal Hazardous Substances Act, *id.* at H-1 to H-9.

[105] *Id.* at C-6 to C-9. In FY 1973, only six were filed; and in 1974, 18 were filed. *Id.* at C-1 to C-6. Since that time, the number of petitions filed each year has decreased. In FY 1981, nine petitions were filed (six for revocation of, amendments to, or exemptions from existing standards). *Id.* at C-23 to C-24. For a fuller discussion of the changes in petitions over the years, see *infra* text accompanying notes 150-56.

[106] Even the Senate sponsors who favored a strong petitioning provision did not want it to disrupt the Commission's "orderly processes." *See supra* note 87 and accompanying text.

[107] 1974 CPSC Ann. Rep. 7.

[108] The CPHI ranked products according to the frequency and severity of the product injury and the age of the persons injured. Added weight was given to injuries to children under 10 years of age. *Id.* at 10.

[109] 1973 CPSC Ann. Rep. 2.

[110] The Commission initiated the standard-developing process with a Notice of Proceeding, 40 Fed. Reg. 8592 (1975).

[111] The Commission published this Notice of Proceeding on Sept. 4, 1974, 39 Fed. Reg. 32,050 (1974).

[112] CPSC Petition Log, *supra* note 104, at C-1 to C-4.

[113] 1974 CPSC Ann. Rep. 11-12. Many products associated with the most frequent and severe injuries, and thus ranked near the top of the CPHI, were unlikely candidates for safety standards. See, for example, the ratings for stairs and ramps (2d), tables (5th), beds (6th), nails (13th) and cutlery (21st). *Id.* at 11. Many injuries associated with these products involved consumer behavior of a sort that product redesign prompted by a safety standard would do little to prevent.

[114] Extension cords ranked 85th on the list, *id.* at 12; the other products did not appear. Of course, the CPHI was not to be the sole guide for the Commission's actions, for it had its recognized limitations. It was based on data collected by the National Electronic Injury Surveillance System (NEISS) that reported only product-related injuries treated in a selected number of hospital emergency rooms throughout the country. It also did not identify the causal connection between injuries and products, that is, how products were used and to what extent they contributed to the reported injuries. *See* Comptroller Gen. of the U.S., The Consumer Product Safety Commission Needs to Issue Safety Standards Faster 15-19 (1977) [hereinafter cited as 1977 GAO

these four cases the Commission would have acted — or at least acted so soon — without petitions.[115]

Petitions had such influence on the agency's priorities for several reasons. At first, a majority of the Commission felt that it had limited discretion to deny petitions. It interpreted section 10 as requiring it to grant any petition presenting an "unreasonable risk of injury," even if other Commission priorities were more compelling or the Commission lacked the resources to pursue the petitioner's request.[116] In its early years, because the Commission had little experience in judging "unreasonable risk," it tended to find sufficient risk to grant petitions even when only a handful of serious product-related injuries had been reported.[117] The Commission's readiness to grant petitions also stemmed from its inexperience with the standard-setting process that followed the granting of a petition. Before the Commission realized the cost and complexity of the standard-setting process,[118] the general belief was that it would undertake numerous standard-setting proceedings. The NCPS had identified over thirty product categories for regulation or investigation,[119] and the CPSC had anticipated that it would initiate forty such proceedings in a single year.[120] In this context, the Commission did not view the granting of eight petitions as a significant portion of its overall standard-setting activity.

b. The Pool Slide Fiasco

In general, the Commission's reactive approach to petitions, while

---

REPORT]. *But see* Decision of the CPSC Regarding Commission's Hazard Data Collection Systems (July 21, 1982) (Comm'r R. David Pittle, concurring) (defending the NEISS system and refuting Comm'r Stuart M. Statler's harsh criticisms of the system).

[115] The two standards initiated by the Commission without petitions dealt with products that appeared on the CPHI. Matches ranked 35th and television sets ranked 69th. 1976 CPSC ANN. REP. 119-20. The NCPS also reported that televisions were in need of a standard. *See supra* note 26.

[116] Chairman Simpson shared this view with Comm'rs Newman and Kushner. *See 1976 House Reform Hearings, supra* note 24, at 14, 32-33, 51. Commissioners Pittle and Franklin disagreed with this position on both legal and policy grounds, observing, among other things, that at least one petition to regulate fondue pots had been denied in light of other more pressing agency priorities. *Id.* at 38 n.6, 47.

[117] Interview with CPSC Comm'r R. David Pittle, in Washington, D.C. (Sept. 16, 1981). For example, little data supported the need for a tent flammability standard. *See* Note, *Consumer Product Safety Commission: In Search of a Regulatory Pattern,* 12 COLUM. J.L. & SOC. PROBS. 393, 429-30 (1976). Similarly scant data supported the swimming pool standard. *See infra* notes 122-35 and accompanying text.

[118] *See infra* Appendix.

[119] *See supra* notes 26-27 and accompanying text.

[120] The Commission promised to publish 40 Notices of Proceeding to initiate standards during fiscal year 1975. *See* Note, *Inside the Proposed Standard for Architectural Glass: An Outward Look at Consumer Participation in the CPSA's Offeror Process,* 43 GEO. WASH. L. REV. 1173, 1206 n.185 (1975); *see also supra* note 79 and accompanying text (CPSC hoped to promulgate 100 standards within a five-year period).

unwise, did not have unduly adverse long-term consequences.[121] The Commission's response to the petition for a swimming pool slide standard, however, embroiled it in a proceeding that suffered from all of the drawbacks of the petitioning process, to the detriment of the Commission and consumers.

The petition for a swimming pool slide standard came from industry members who had an admitted economic stake in the establishment of a mandatory product standard.[122] The petition, which was the first filed and the first granted under the CPSA, was supported by only a few serious known injuries.[123] The product was not ranked on the CPHI, and a number of the known injuries had occurred as a result of rather bizarre circumstances.[124] To the relatively inexperienced Commissioners, however, the serious nature of the injuries was sufficiently compelling to warrant a finding that the product posed an "unreasonable risk."[125] A majority of the Commission believed that this finding compelled the initiation of a standard.[126] They had no way of knowing then that the swimming pool slide safety standard would take several years to complete[127] and consume untold Commission resources. Nor could they realize that it would be the first safety standard the Commission issued under the CPSA and one of the only three standards it completed under this act in its first five years of existence, and thus would stand out as one of the Commission's priority projects.[128] Had they had such foresight they surely would not have made this project an initial priority. Unfortunately for the Commission, its pool slide standard has never been excused as a mistake attributable to inexperience; instead it has been cited countless times as an example of Commission failure.[129]

---

[121] In 1976 Chairman Simpson estimated that at least 75% of Commission activities had been "reactive as opposed to planned" and that if the Commission had been able to select its own priorities, rather than react to petitions, it would have been able to address over a million more preventable injuries each year than it had addressed. *1976 House Reform Hearings, supra* note 24, at 15. However, he did not provide a list of rulemaking projects he would have initiated in place of those already begun.

The deference to petitions in most cases did not bog the Commission down in frivolous matters. Three of the granted petitions concerned products which appeared to warrant early attention — lawn mowers, architectural glass, and space heaters. *See supra* text accompanying note 113. The Commission never developed standards for three other granted petitions. Soon after granting the petition concerning flammable tents, the Commission determined that the risk did not warrant a mandatory standard and committed no additional resources. Interview with Robert Adler, Special Assistant to CPSC Comm'r R. David Pittle, in Washington D.C. (July 30, 1982). Similarly, the Commission did not undertake proceedings to develop a standard for extension cords, although that product received congressional attention during oversight hearings in 1977. *Implementation of the CPSA: Hearings Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science, and Transportation,* 95th Cong., 1st Sess. 131-32 (Apr. 1977) [hereinafter cited as *Apr. 1977 Senate Oversight Hearings*]. The Commission reversed its earlier grant of the petition when Underwriters Laboratories developed improved voluntary standards and compliance with these guidelines reached about 80% of extension cord production. 43 Fed. Reg. 9632, 9632-33 (1978).

As for aluminum wiring, the Commission solicited offerors, 40 Fed. Reg. 51,218 (1975), but found none acceptable. [1975-1977 Transfer Binder] CONSUMER PROD. SAFETY GUIDE (CCH) ¶ 42,863. The Commission decided that its staff would develop the standard. *Id.* In the meantime, it proceeded with litigation against industry members under its authority to seek equitable relief with respect to "imminently hazardous" consumer products, 15 U.S.C. § 2061(a) (1976). After prolonged litigation, the D.C. Circuit Court of Appeals held that aluminum branch circuit wiring systems are not "consumer products" within the meaning of the CPSA and thus fall outside the CPSC's jurisdiction. CPSC v. Anaconda Co., 3 CONSUMER PROD. SAFETY GUIDE (CCH) ¶ 75,284 (D.C. Cir. Jan. 7, 1982). The Commission is now considering ending any further effort to regulate aluminum wiring. 3 CONSUMER PROD. SAFETY GUIDE (CCH) ¶ 45,816 (1982).

[122] *See* Aqua Slide 'N' Dive Corp. v. CPSC, 569 F.2d 831, 835-36 (5th Cir. 1978). The petitioners were the National Swimming Pool Institute, which was the industry trade association, and Aqua Slide, which at that time manufactured 95% of the swimming pool slides in use in the country. The court found that Aqua Slide's "admitted motive" as petitioner was to "prevent a product ban or forced repurchase" under FHSA, which had been threatened by the FDA before enactment of the CPSA. *Id.* at 835.

[123] The Commission's investigations of slide injuries revealed only 14 cases resulting in paraplegia or quadraplegia. 1977 GAO REPORT, *supra* note 114, at 23-24.

[124] One accident victim had been drinking and hit a chair floating in the pool and one had dived through a hoop. Another went down a slide installed in three feet of water and yet another slid down on his knees. Aqua Slide 'N' Dive Corp., 569 F.2d at 841.

[125] Pittle Interview, *supra* note 117.

[126] Chairman Simpson testified that the standard was "probably mandated" by

In 1980, the Commission considered revoking the pool slide standard after a study revealed that it offered few safety benefits and adversely affected competition.[130] Ironically, dispensing with this albatross of a rule was not to be so easy. The original industry petitioner vowed to challenge any attempt to revoke the rule,[131] and the Commission, faced with severe budget cuts in 1981,[132] decided to use its resources elsewhere rather than spending them to revoke a rule that had already consumed too many resources.[133]

The swimming pool slide standard is hardly a representative example of the Commission's work over the years. But it dramatically demonstrates the long-term adverse consequences of a petitioning process that encourages early and hasty resource commitments to regulatory activities outside of an agency-established agenda of regulatory priorities. This "worst case" to come out of the petitioning pro-

---

§ 10 but had been the "least productive agency proceeding." *1976 House Reform Hearings, supra* note 24, at 7; *see also supra* note 116 and accompanying text (views of Comm'rs Newman and Kushner).

[127] The petition was filed May 30, 1973, CPSC Petition Log, *supra* note 104, at C-1, and the final rule was published Jan. 19, 1976, 41 Fed. Reg. 2742 (1976).

[128] The first three standards were for swimming pool slides, 16 C.F.R. §§ 1207.1-1207.5, 1207.9-1207.12 (1982), matchbooks, *id.* §§ 1202.1-1202.7, and architectural glazing materials, *id.* §§ 1201.1-1201.7. The Commission had also issued final regulations under the transferred statutes for, among other things, bicycles, cribs, and fireworks, and in addition had published a number of proposed standards. *See Apr. 1977 Senate Oversight Hearings, supra* note 121, at 110-11 (testimony of S. John Byington, CPSC Chairman).

[129] *See, e.g.,* 1977 GAO REPORT, *supra* note 114, at 11, 23; *Apr. 1977 Senate Oversight Hearings, supra* note 121, at 36; *see also* H.R. REP. NO. 1164, 95th Cong., 2d Sess. 8 (1978) (concluding that the CPSC inefficiently used consumer and industry expertise, managed the offeror process, and unwisely selected products for priority attention).

[130] United States CPSC, Statutory Rule Review Report to Congress 19-21 (May 1980). After the standard was issued, the number of slide manufacturers fell from seven to one. The economic benefits of the standard, which originally had motivated Aqua Slide to petition for a rule, had come to pass. *See supra* note 122 and accompanying text.

[131] 9 PROD. SAFETY & LIAB. REP. (BNA) 529 (1981).

[132] In 1981, the Reagan administration proposed a 30% budget cut for the CPSC, the highest proposal for any health and safety agency. CPSC Memo 2 (May 1981).

[133] Prior to being presented to the Commission, the staff recommendation to revoke the rule had consumed 10 working months. The staff estimated the cost of revocation would be $200,000. 9 PROD. SAFETY & LIAB. REP. (BNA) 529 (1981).

cess was doubtless the type of case Congress sought to avoid by delaying the judicial review provision of section 10(e).[134] Clearly, the CPSC would have fared better had it adopted at the outset the more cautious approach to petitions reflected in that provision.

2. *Management of the Petitioning Process*

a. *The Early Years*

In keeping with its favorable attitude toward the petitioning process, in the early years the Commission staff thoroughly evaluated and studied each petition, even when petitioners supplied little data to substantiate the need for a safety standard or ban.[135] The Commission often used the procedures authorized by the CPSA, including public hearings, to investigate the petitioners' claims.[136]

The Commission's approach to the petitioning process was more costly than necessary because it failed to screen out the more frivolous petitions. The staff evaluated petitions that on their face seemed meritless, such as a petition for a safety standard for earrings that could pull earlobes if they caught on objects,[137] and another for pointed-tipped umbrellas that could be used like spears.[138]

Because there was no limit to the resourcefulness of petitioners who sought standards for everything from high-heeled shoes to harness-racing sulkies, the absence of a more sensible management of the process became a major target of congressional criticism.[139]

---

[134] *See supra* text accompanying notes 96-99.

[135] Interview with Douglas Noble, CPSC Program Manager for Emerging Hazards, in Washington, D.C. (July 17, 1981) [hereinafter cited as Noble Interview]; Freeston Interview, *supra* note 102; *see also* N.Y. Times, Jan. 30, 1978, at A14, col. 1 (interview with CPSC Chairman S. John Byington) ("[T]he agency started to act on every petition concerning a product for which a risk was found, whether the product was aluminum wire, which carried the risk of fire, or water buffalo sandals, which carried the risk of an itch.").

[136] In FY 1974, for example, the Commission reported that it had conducted in-depth studies on petitions concerning aerosols, tent flammability, plastic balloons, "Scotchgard," vinyl chloride, dishwasher interlocks, and lead-core candles. 1974 CPSC ANN. REP. 18. The Commission contracted for extensive laboratory analysis on these products and held public hearings or meetings on aerosols, lead-core candles, and plastic balloons. *Id.* In considering the petition for a dishwasher interlock standard (which was submitted by Consumers Union) the Commission staff studied existing data, commissioned the Bureau of Biomedical Science to conduct independent tests, and collected energy data from manufacturers. In the end, the Commission concluded that the risk was not appreciable and denied the petition. 39 Fed. Reg. 26,313 (1974).

[137] Petition No. CP76-17, CPSC Petition Log, *supra* note 104, at C-11. The staff looked at NEISS data and found they did not identify injuries specifically associated with earrings. One in-depth investigation and one consumer complaint revealed that injuries from earrings were minor. The Commission denied the petition. 42 Fed. Reg. 833 (1977).

[138] Petition No. CP79-2, CPSC Petition Log, *supra* note 104, at C-19. The Commission staff studied the umbrella problem to determine the utility of the existing design, the possible economic consequences of a safety standard, and how many manufacturers might be adversely affected if a standard were imposed. Interview with Stephen Lemberg, CPSC Office of the General Counsel, in Washington, D.C. (Sept. 23, 1981) [hereinafter cited as Lemberg Interview]. This effort was undertaken despite the fact that the petitioner had cited few injuries in support of the need for an umbrella standard and several of these had been caused by intentional assaults. *Id.* The Commission eventually denied the petition. 44 Fed. Reg. 47,583 (1979).

[139] Senator Proxmire used these two examples, plus a petition to regulate "pet turtles," to criticize the statute's petitioning provisions. 4 PROD. SAFETY & LIAB. REP. (BNA) 139 (1975). The pet turtle petition, while seeming frivolous, was considered a

b. Criticism and Reform

One inevitable consequence of the Commission's thorough investigation of all petitions was a serious backlog in the early years.[140] The Commission usually made decisions on petitions after the 120-day statutory deadline,[141] sometimes more than a year late.[142] The backlog was a highly visible and measurable Commission failure which caught and held congressional attention.[143] Consumer groups were also critical of the delays which the statutory deadline had been designed to prevent.[144]

In response to widespread criticism of the Commission's management of petitions, its second chairman, S. John Byington, established a management system that eliminated much of the backlog and began to deal with petitions within the statutory time frame.[145] The Commission organized a team to conduct preliminary reviews. It screened out letters and inquiries that were technically not petitions, but previously might have been characterized as such.[146] Further, the Commission stopped assuming responsibility for the research, investigation, and data collection necessary to evaluate a petitioner's claim of unreasonable risks. Instead it required petitioners to demonstrate the need for a standard or ban.[147] These changes enabled the Com-

---

serious matter, however, by the petitioner, Consumers Union, because the turtles posed a serious risk of salmonella to children. Consumers Union charged the Commission with not even attaining a "snail's pace, much less a turtle's" in handling its petition. *CPSC Oversight, 1975: Hearings on S. 644 and S. 1000 Before the Subcomm. for Consumers of the Senate Comm. on Commerce,* 94th Cong., 1st Sess. 22 (1975) [hereinafter cited as *1975 Senate Oversight Hearings*].

[140] After the first three years there was a backlog of 80 petitions. *Oct. 1977 Senate Oversight Hearings, supra* note 81, at 6 (testimony of CPSC Chairman S. John Byington).

[141] 15 U.S.C. § 2059(d) (1976) (repealed 1981).

[142] For example, the Commission had taken two years to make its decisions in the harness-racing sulkies and pet turtle petitions. CPSC Petition Log, *supra* note 104, at C-2, C-7. The Commission initiated standard setting more than 17 months after a petition on cellulose insulation was filed, 43 Fed. Reg. 10,427 (1978) — a delay that prompted Congress to legislatively mandate a standard for cellulose insulation. *See generally* SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95TH CONG., 2D SESS., REPORT ON HOME INSULATION 4 (Comm. Print 1978) (noting hazards associated with various types of insulation and recommending a mandatory standard for cellulose insulation) [hereinafter cited as 1978 HOUSE INSULATION REPORT].

[143] *See, e.g., Apr. 1977 Senate Oversight Hearings, supra* note 121, at 138 (remarks of Sen. Ford). These hearings focused on the Commission delay in developing standards as well as in handling petitions, and considerable criticism was directed at the Commission. *See id.* at 129-38. The Subcommittee Chairman Wendell Ford found the Commission's overall performance "lackluster at best" and called Chairman Byington back to testify on the agency's performance within six months. *Oct. 1977 Senate Oversight Hearings, supra* note 81, at 1.

[144] *1975 Senate Oversight Hearings, supra* note 139, at 21 (Consumers Union's criticism of Commission delay in responding to its petitions).

[145] Chairman Byington reported that during the 20-week period between oversight hearings in April and October 1977, the Commission had processed over 40 petitions. *Oct. 1977 Senate Oversight Hearings, supra* note 81, at 6.

[146] Lemberg Interview, *supra* note 138.

[147] *Id.*

mission to reduce the time and effort spent on petitions and to begin satisfying congressional concerns about delay.

Under this system, the Commission has remained responsive to petitions, but it now processes them more efficiently. When petitioners report unreasonable product risks, the staff usually seeks voluntary corrective action from industry rather than initiating proceedings to set standards. In recent years petitions have alerted the Commission to a number of risks which it otherwise might not have recognized as quickly, including risks from such products as quartz heaters, electric space heaters, and power wood splitters.[148] The Commission has also used petitions to encourage industry to upgrade voluntary standards.[149] The petitioning process operating in this informal manner has, on the whole, been more effective than the formal procedures created by section 10.

3. *Changing Role of Petitions*

The Commission's streamlined management system decreased the number of petitions filed. The Commission categorized fewer requests as petitions and also stopped encouraging them.[150] In addition, some potential petitioners doubtless lost their incentive to file petitions as it became evident that the Commission would undertake few proceedings to ban products or set safety standards.[151] As a result, the number of petitions dropped substantially after 1975.[152]

The nature of petitions also changed. In the early years, many CPSA petitioners were consumer and industry groups asking the Commission to initiate regulatory activity.[153] As final safety standards began to be issued, the bulk of CPSA petitions shifted to requests from business for exemptions from, amendments to, or revocation of final standards.[154] Of the petitions filed in fiscal year 1978, only those seeking exemptions from or amendments to recently issued rules were granted.[155] Petitions under the FHSA, though fewer in number, revealed the same trend.[156] The petitioning process had evolved from a catalyst for agency regulation, as the Senate had once envisioned, to a vehicle for business interests seeking modifications of existing rules. This development should have come as no surprise: Congress had designed section 10 for this particular use and similar trends in the use of the petitioning process had occurred in other agencies.[157]

---

[148] Noble Interview, *supra* note 135.

[149] *Id.*

[150] Freeston Interview, *supra* note 102.

[151] *See infra* text accompanying notes 206-60.

[152] CPSC Petition Log, *supra* note 104. From a high of 27 petitions in FY 1975, petitions fell to 13 in FY 1979, 7 in FY 1980, and 9 in FY 1981. *Id.* at C-1 to C-24.

[153] *See* CPSC Petition Log, *supra* note 104. While both the consumer petitions and early industry petitions sought new safety standards, those from industry, unlike those from consumers, often were motivated by economic self-interest. *See infra* note 168.

[154] *See* CPSC Petition Log, *supra* note 104. For a discussion of the petitions under the statutes transferred to the CPSC, see also *supra* note 104. In FY 1981, seven out of nine CPSA petitions came from businesses seeking to avoid final safety rules for such products as lawn mowers, architectural glazing materials, and unvented gas space heaters. CPSC Petition Log, *supra* note 104, at C-22 to C-23.

[155] *See* CPSC Petition Log, *supra* note 104, at C-15 to C-19. Of the nine petitions granted in FY 1977 and FY 1978, seven concerned the architectural glazing rule, one concerned the lead paint ban, and another requested a standard for home insulation. *Id.* at C-13 to C-18.

[156] *See id.*, at H-1 to H-17. The highest number of petitions under FHSA was in FY 1975. By FY 1979, there were only three petitions; and in 1980, only two.

Almost half of all FHSA petitions sought rule exemptions, amendments, or revocations, but unlike CPSA petitions, they were not all concentrated in the later years.

C. *Revocation of Section 10*

The 1981 Consumer Product Safety Amendments revoked section 10,[158] leaving petitioners' rights to be governed by the APA. The major statutory effect is the elimination of both the requirement that the Commission act on petitions within 120 days and the right of petitioners to obtain *de novo* review of denials. Agency denials of petitions will be reviewed under the arbitrary and capricious standard of the APA instead.[159]

The practical impact, however, should be negligible. The 120-day deadline has not been difficult to meet in recent years, and the judicial review provision was never an important factor in the Commission's implementation of section 10.[160] Only two suits were ever filed under section 10(e)[161] and both were dismissed.[162] Moreover, the Commission was actually less responsive to petitioners *after* section 10(e)'s effective date than it had been before the section took effect.[163] The 1981 amendments therefore should herald no major change in the Commission's management of petitions.

D. *Reflections on the Process*

Section 10 was not properly designed to carry out one of its central purposes — to prevent bureaucratic inertia — for at most, it provided

---

Because the FHSA had been in existence for a few years before it was transferred to the CPSC, several bans and standards were already in effect or promulgated early in the Commission's existence. Hence, FHSA petitions for exemptions and amendments, which seem to follow naturally the issuance of a regulation, were among the first petitions to arrive at the CPSC. Consumer petitions that were granted, however, did come mostly in the earlier years. *See id.*

[157] *See* Scalia & Goodman, *supra* note 61, at 951-52. The HEFFRON REPORT found that petitions had been used infrequently to urge new standards for automobile safety under the National Traffic and Motor Vehicle Safety Act, but that regulated companies often had petitioned for relief from existing rules or for changes that would improve their economic position. HEFFRON REPORT, *supra* note 42, at 51-52.

[158] Consumer Product Safety Amendments of 1981, Pub. L. No. 97-35, § 1210, 95 Stat. 703, 721.

[159] *See supra* note 85 and accompanying text.

[160] Freeston Interview, *supra* note 102.

[161] Lorch v. CPSC, No. 76-174 (W.D. Cal.) (to compel the initiation of rulemaking to ban incandescent Christmas tree lights and require a light-emitting-diode light system of a kind petitioner produced); National Resources Defense Council v. CPSC, No. 75-712 (D.D.C.) (to compel action on a petition to ban aerosol sprays containing chlorofluorocarbons). Both cases are discussed briefly in 1976 CPSC ANN. REP. 171-72.

[162] Lemberg Interview, *supra* note 138.

[163] *See supra* text accompanying notes 100-01.

a means for petitioners to force the initiation, but not the prompt completion, of a regulatory proceeding. Section 10 was well designed to achieve an unintended purpose — to give outsiders a real voice in the setting of agency priorities,[164] for it covered only requests for standards and bans, and not for adjudicatory proceedings, and thus deference to petitioners necessarily meant the commitment of significant agency resources.

Section 10's drafters may have hoped that the provision would not be used frequently,[165] but that its mere existence would make the CPSC responsive to public concerns. However, because the Commission chose to give greater deference to the petitioning process than the statute required, petitioners had a significant impact on the agency's agenda. Although the Commission's interpretation of section 10 was not unreasonable,[166] it was not sound policy. Fortunately, this policy did not prevail.[167]

As a general rule it is unwise to give petitioners such power to influence an agency's direction. Often petitioners promote narrow concerns; indeed, many seek regulatory actions out of economic self-interest.[168] They often have limited information on which to base their claims and cannot appreciate the relative importance of their requests. The APA provisions assigning petitioners a limited role establish a better petitions management model.

This is not to say that there are not important, well-substantiated petitions which should be given careful attention. But investing petitioners with legal rights to press their particular interests does not assure, and indeed may thwart, the agency's fulfillment of its obligation to attend overall to matters of public importance. The agency is responsible for setting its priorities; if it fails to do so, Congress through legislation and oversight, not petitioners, should provide it with necessary direction.

---

[164] Even the Senate, whose version had provided petitioners with far greater legal rights than the House version, intended no disruption in the agency's decision making. *See supra* note 87.

[165] The Senate Labor Committee thought, apparently correctly, that few petitioners would pursue their legal rights because they had no economic incentive for doing so. *See supra* note 87.

[166] Section 10(e)(2) provided that the court determine *de novo* whether the consumer product named in the petition presented an "unreasonable risk" and would expose the petitioner to harm if not corrected by a proceeding under § 7 or § 8 of the CPSA. 15 U.S.C. § 2059(e)(2) (1976) (repealed 1981). By not requiring judicial deference to the CPSC's decisions, the section implied that the agency did not have broad discretion to decide petitions in light of overall policies and priorities.

[167] The Commission's regulations governing the petitioning process, issued at the end of 1976, provided that the Commission would take into account the agency's resource priorities in deciding petitions. 16 C.F.R. § 1110.11(b) (1982). As late as 1979, however, Comm'r Stuart Statler complained that the Commission staff was continuing to spend excessive time on trivial petitions. CPSC Press Release (Dec. 21, 1979).

[168] For example, the petitioner for the swimming pool slide standard, Aqua Slide 'N' Dive Corp., was economically interested in having a mandatory standard established, *see supra* note 122 and accompanying text, and the standard did have an adverse effect on competition, *see supra* note 130. The industry petitioners for both the architectural glazing standard and the power mower standard petitioned for Commission acceptance of voluntary industry standards in the belief that the CPSC could proceed directly to propose those standards, thereby bypassing the offeror process. *See* Office of Program Planning and Evaluation, CPSC, Evaluation of Offeror Process 4-17 (Nov. 5, 1976) [hereinafter cited as OPPE Staff Report]. Thus these petitioners were also seeking solutions that were in their economic interest. Indeed, Commission staff suspected that they would not have approached the Commission had they known that it would not proceed with their proposed voluntary standards. *Id.*

III. Standard Setting — The Offeror Process

A. Background

When the CPSA was enacted, Congress and commentators thought that industry-wide product safety rules would be among the CPSC's key enforcement tools.[169] Their favorable view of industry-wide regulation was not surprising. Courts and scholars often touted the advantages of regulation over case-by-case adjudication as a means of implementing broadly worded statutes.[170]

Proponents of industry-wide regulation believed it would be advantageous to all concerned parties. Rules were arguably more equitable for industry than case-by-case adjudication, for they applied across the board and did not single out individual companies. Rulemaking procedures required notice, an opportunity for industry input,[171] and more comprehensive agency factfinding.[172] Moreover, the use of industry-wide regulation enabled the agency to use its resources more efficiently and to set its priorities more effectively. Agency adjudication, by comparison, was often ad hoc.[173] In addition, broad regulation provided more consumer protection because entire industries would become subject to a prescribed standard, whereas adjudication bound only the parties subject to the suit.[174] Finally, regulation was a more democratic and more visible method of statutory implementation. Regulations were more susceptible to congressional oversight thereby making agencies more accountable for their actions.[175]

The statute, designed to achieve these advantages, required an unusual two-tiered procedure. Section 7 of the CPSA, the "offeror process,"[176] required the Commission to solicit and utilize persons outside the agency who offered to develop initial draft safety standards.[177] Section 9 required the Commission to use informal rulemaking procedures to solicit public comments on proposed standards and to promulgate final product safety standards.[178]

---

[169] *See* Scalia & Goodman, *supra* note 61, at 906; *see also supra* note 60 and accompanying text (NCPS's espousal of mandatory standards); *infra* note 179 (Senate and House bills proposing standard-setting authority).

[170] *See, e.g.,* National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 681-83 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 951 (1974); K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.15 (1st ed. Supp. 1970).

[171] *See* Bernstein, *The NLRB's Adjudication — Rule Making Dilemma Under the Administrative Procedure Act,* 79 YALE L.J. 571, 591 (1970).

[172] K. DAVIS, *supra* note 170, § 6.15. Administrative adjudication, by comparison, often involved arguably unfair retroactive lawmaking. *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 780-83 (1969) (Harlan, J., dissenting); NLRB v. Majestic Weaving Co., 355 F.2d 854, 860-61 (2d Cir. 1966).

[173] *See* Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy,* 78 HARV. L. REV. 921, 932-33 (1965).

[174] NCPS FINAL REPORT, *supra* note 19, at 6. Of course, an agency can expect compliance with rulings in adjudicated cases from parties other than those directly involved in the adjudication.

[175] *See* K. DAVIS, *supra* note 170, § 6.15.

[176] The offeror process was first introduced, without explanation, in legislation proposed by the NCPS. Proposed Consumer Product Safety Act § 8, *reprinted in* NCPS

The offeror process[179] allowed a product manufacturer, distributor, or retailer to be an offeror for a standard affecting its own product. If a self-interested offeror was the only one selected, the CPSC could simultaneously develop its own proposed standard.[180] This latter provision, while providing a safeguard against undue industry influence, was a costly approach that the Commission never used.

The statute also allowed the Commission to contribute to offerors' development costs in order to make the process more available to consumer groups.[181] In addition, the statute required that the development process include an opportunity for participation by "interested persons (including representatives of consumers and

---

Final Report, *supra* note 19, at app. 8-10. On its face, the two-stage rulemaking process seemed inconsistent with the NCPS's clear preference for streamlined procedures. *See supra* notes 55-56 and accompanying text. One NCPS Commissioner, Michael Pertschuk, remembered that the proposal came near the end of the deliberations and was not given careful consideration. Interview with Michael Pertschuk, member of the NCPS and now Commissioner of the Federal Trade Commission, in Washington, D.C. (Dec. 28, 1981). As he recalled, it was meant to allay some Commission members' growing concerns that the NCPS's proposed legislation would give the new product safety commission too much authority over industry. *Id.* Under the offeror process the Commission would share its role in developing regulations with outside groups, including members of the business community. The NCPS's proposed legislation did not prohibit members of industry from serving as offerors. Proposed Consumer Product Safety Act § 8(c), *reprinted in* NCPS Final Report, *supra* note 19, at app. 9.

[177] 15 U.S.C. § 2056(d) (1976) (repealed 1981).

[178] *Id.* § 2058(b) (codified as amended at 15 U.S.C. § 2058(d)(2) (Supp. V 1981)). There was one addition to the usual informal rulemaking procedures — a hearing at which oral testimony could be given. *See infra* text accompanying notes 189-92.

[179] Section 7 was a compromise between markedly different Senate and House bills. The Senate bill provided that only those with no economic stake in the outcome could be offerors. Industry groups could be offerors but not for standards affecting their own products. S. 3419, 92d Cong., 2d Sess. § 303(e)(1)(C) (1972), *reprinted in* BNA, *supra* note 2, at app. 193, 202. This provision was consistent with the NCPS's position that standards should not be left to those with an economic interest in the results. *See supra* note 35 and accompanying text. Also, the Senate bill placed less reliance on the offeror process to develop standards. It did not require the Commission to accept any offers and when the Commission did accept an offer, it could independently develop a standard at the same time the offeror was at work. The agency could develop a standard if to do so would be of "benefit to the public." S. 3419, 92d Cong., 2d Sess. § 304 (1972), *reprinted in* BNA, *supra* note 2, at app. 193, 202.

In contrast, the House bill prohibited the CPSC from proceeding independently to develop a proposed standard once it had accepted an offer. H.R. 15,003, 92d Cong., 2d Sess. § 7(e)(2) (1972), *reprinted in* BNA, *supra* note 2, at app. 295, 299. Furthermore, it did not ban the development of standards by economically interested offerors. The CPSC could select "any person" as an offeror as long as he was technically competent, would comply with the Commission's regulations, and would be likely to meet the deadlines for standard development. *Id.* § 7(b)(4), (d)(1), *reprinted in* BNA, *supra* note 2, at app. 298. Indeed, House members anticipated that offerors would often be industry groups that could provide the expertise necessary to develop safety standards. *See* 118 Cong. Rec. 31,376 (1972) (remarks of Rep. Springer), *reprinted in* BNA, *supra* note 2, at app. 249; *id.* at 31,378 (remarks of Rep. Moss), *reprinted in* BNA, *supra* note 2, at app. 253. House members saw the offeror process as a means for business interests to have more than the usual amount of input in rulemaking. *Id.* at 31,375 (remarks of Rep. Staggers), *reprinted in* BNA, *supra* note 2, at app. 248.

[180] 15 U.S.C. § 2056(e)(2) (1976) (repealed 1981).

[181] *Id.* § 2056(d)(2) (repealed 1981). The Commission allocated most of the funding for consumer group offerors. *See infra* note 223 and accompanying text.

consumer organizations)."[182] As a check on bureaucratic lethargy, Congress inserted short statutory deadlines for each phase of the regulatory process. The original overall time frame, from the Commission's invitation to submit offers to the promulgation of a final standard, was set at 270 days, but the Commission could extend the deadlines on a showing of "good cause."[183]

B. The Statutory Scheme — A Closer Look

1. Section 7: Stage One of the Process

The offeror process began when the Commission determined that a safety standard was needed. The Commission then published in the *Federal Register* a Notice of Proceeding (NOP) which described the need for a standard and invited persons outside the Commission to propose an existing standard or to offer to develop a new standard.[184] "Offerors" had thirty days to submit their proposals.[185] Unless the Commission found a proposed existing standard adequate, it was to select an offeror to develop a standard.[186] The statutory grounds for declining to use the offeror process were limited.[187] A wide range of persons or groups could be offerors,[188] including consumer groups, state or federal agencies, standard-setting organizations, and industry groups.

Under the original Act, an offeror had 150 days after publication of the NOP to develop a proposed standard.[189] This deadline, however, included the thirty-day period for submission of an offer, and in effect limited the offeror to 120 days for the proposal's development.[190] The

---

[182] 15 U.S.C. § 2056(d)(3)(B) (1976) (repealed 1981).

[183] The statute required the Commission to publish a proposed rule within 210 days of the publication of the initial invitation. *Id.* § 2056(f) (Supp. II 1972) (amended 1976, 1978, repealed 1981). Sixty days after publication of the proposed rule, the Commission was to issue a final standard or terminate the proceeding. *Id.* § 2058(a)(1) (codified at 15 U.S.C. § 2058(d)(1) (Supp. V 1981)).

[184] The *Federal Register* notice identified the product and the associated risk of injury; included the Commission's determination that a safety standard was necessary to reduce the risk; provided information about existing standards that might be relevant to the proceeding; and invited persons, states, and federal agencies, other than the Commission, to submit existing safety standards or offers to develop standards to address the risks. 15 U.S.C. § 2056(b) (Supp. II 1972) (amended 1976, 1978, 1981).

[185] *Id.* § 2056(b)(4) (repealed 1981).

[186] *Id.* § 2056(c)-(d) (repealed 1981). The Commission could also accept more than one offer. *Id.* § 2056(d)(2) (repealed 1981).

[187] *Id.* § 2056(d)(1) (repealed 1981). If the Commission found an offeror to be technically competent, able to comply with Commission regulations, and likely to meet the deadlines for standard development, it was required to accept the offer. *Id.* § 2056(d)(1) (repealed 1981).

[188] *Id.* § 2056(b)(4) (repealed 1981).

[189] *Id.* § 2056(b).

[190] *Id.* This was the statutory time frame applicable for all but one offeror proceeding. *See infra* note 240 and accompanying text. In 1976, however, Congress amended the Act to allow an offeror 150 days from its acceptance by the Commission for the proposal's development. Pub. L. No. 94-284, §7(a), 90 Stat. 503, 505 (1976).

In 1978, Congress substituted for the statutory deadlines a requirement that the statute provided the offeror little guidance as to how to proceed, except to require that it give "interested persons" notice and an opportunity to participate in the development process.[191] Although this provision specified that consumers were to be among the "interested persons," it left to Commission regulation the actual extent and manner of consumer participation.[192]

The statute also said little about the Commission's role during this period. Although it precluded the Commission from developing a standard while the offeror was at work unless the offeror was a producer or seller of the product to be regulated,[193] it did not prohibit the Commission staff from simultaneously developing the expertise necessary to review the offeror's final proposal.[194]

When the offeror submitted its proposal to the Commission, the agency had sixty days to publish for comment a proposed safety standard or a notice withdrawing its NOP.[195] The Commission was free to adopt the offeror's proposal in its entirety or to completely revise it, for it was merely "a proposal for a proposed rule,"[196] that could "constitute anything from the core of the rulemaking process to a set of . . . inconsequential preliminaries."[197]

2. *Section 9: Stage Two of the Process*

The Commission's publication of a proposed safety standard commenced the second stage of the rulemaking process. This stage was almost entirely governed by the APA's informal rulemaking procedures.[198] The streamlined, informal proceedings were to take sixty

---

Commission publish in the *Federal Register* the timetable in which an accepted offeror should develop its proposal. Pub. L. No. 95-631, § 3, 92 Stat. 3742, 3742-43 (1978). If within 45 days after that period the Commission had not published a proposed standard, it was to specify a period in which it would do so or terminate the proceedings. *Id.* § 4(c), 92 Stat. at 3744.

[191] 15 U.S.C. § 2056(d)(3) (1976) (repealed 1981). The statute directed the Commission to promulgate procedures to govern the development process that would require, *inter alia,* that the offeror support its ultimate proposal with suitable tests or data and maintain and make available a record of the standard development process. *Id.*

[192] *Id.* § 2056(d)(3)(B) (repealed 1981). The Commission soon had to decide whether consumers who participated in standards development could be compensated for their time. The National Consumers League (NCL), which offered to develop the standard for architectural glass, first raised the issue. The Commission rejected NCL's offer because it could not reach agreement with NCL on the issue of consumer payments. *See* Note, *supra* note 120, at 1188-92.

[193] 15 U.S.C. § 2056(e)(2) (Supp. II 1972) (repealed 1981); *see supra* text accompanying note 180.

[194] H.R. REP. NO. 1593, 92d Cong., 2d Sess. 45, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4596, 4636, *and in* BNA, *supra* note 2, at app. 311, 324.

[195] This 60-day review period was not expressly stated in the statute, but followed from the overall limit of 210 days from Notice of Proceeding (NOP) to proposed rule, and the 150-day development period for the offeror. *See supra* notes 183, 189-90 and accompanying text. The 1976 amendments did not affect this review period.

[196] Scalia & Goodman, *supra* note 61, at 908.

[197] *Id.*

[198] 15 U.S.C. § 2058(a) (1976) (codified at 15 U.S.C. § 2058(d)(2) (Supp. V 1981)). One exception was the requirement that "interested persons" be allowed to present their views orally as well as in writing and that a transcript of oral proceedings become a part of the final record. *Id.* § 2058(a)(2) (codified at 15 U.S.C. § 2058(d)(2) (Supp. V 1981)). Under the Administrative Procedure Act (APA) an agency may allow oral presentation but is not required to do so. 5 U.S.C. § 553(c) (1976). With this provision Congress sought the advantages of oral testimony without the disadvantages of the time-consuming formal rulemaking process which the NCPS had criticized so harshly. H.R.

days.[199] Final safety standards could require that certain warnings and instructions accompany products and could also establish product design and performance requirements, though "whenever feasible" standards were to be "expressed in terms of performance requirements."[200]

Although the rulemaking procedures were informal, the scope of judicial review of standards was that normally used for formal proceedings. The statute provided that a court could affirm product safety standards only when the Commission's findings were based on "substantial evidence on the record taken as a whole."[201] This standard was chosen over the "arbitrary and capricious test" that is normally applicable to informal rulemaking,[202] in the apparent belief that it was more demanding[203] and would provide an important check on the Commission's use of its vast standard-setting authority.[204]

C. *Implementation — An Overview*

Many of the perceived advantages of agency rulemaking[205] were not realized under the CPSA. Standards did not become the efficient and effective enforcement tool the NCPS and Congress had envisioned. The Commission has issued only seven product safety standards under the CPSA.[206] Congress mandated one of those standards, cel-

---

Rep. No. 1153, 92d Cong., 2d Sess. 23 (1972), *reprinted in* BNA, *supra* note 2, at app. 211, 227; *see supra* note 55 and accompanying text.

[199] 15 U.S.C. § 2058(a)(1) (1976) (codified at 15 U.S.C. § 2058(d) (Supp. V 1981)).

[200] *Id.* § 2056(a)(1) (amended 1981).

[201] *Id.* § 2060(c).

[202] 5 U.S.C. § 706 (1976). Under the APA, the standard of review for informal agency actions is whether the agency's findings or conclusions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A).

[203] Some scholars have urged that this belief is ill-founded. They suggest that the substantial evidence test differs from the arbitrary and capricious test only in that it confines review to the public record made pursuant to the APA's formal procedures, and is not a more exacting standard of review. *See* Scalia & Goodman, *supra* note 61, at 934.

[204] Both House and Senate Committees recommended the "stricter" or "greater" standard of judicial review for standards. *See* H.R. Rep. No. 1153, 92d Cong., 2d Sess. 38 (1972), *reprinted in* BNA, *supra* note 2, at app. 211, 229; S. Rep. No. 749, 92d Cong., 2d Sess. 35 (1972), *reprinted in* BNA, *supra* note 2, at app. 61, 95.

[205] *See supra* notes 170-75 and accompanying text.

[206] This figure does not reflect the Commission's overall record for mandatory standards or bans. In addition to the product safety standards under CPSA, the CPSC has issued six bans under § 8 of that statute, *see* 16 C.F.R. §§ 1301.1-1305.5 (1982), 47 Fed. Reg. 14,366 (1982) (to be codified at 16 C.F.R. § 1306); seven regulations under the Federal Hazardous Substances Act, *see* 16 C.F.R. §§ 1505.1-1512.20 (1982); and seven standards under the Flammable Fabrics Act, *see* 16 C.F.R. §§ 1610.1-1632.63 (1982).

The CPSC did most of its rulemaking under the transferred acts. This was due in part to § 30(d) of the CPSA which directed the Commission not to use the CPSA when the transferred statutes provided adequate authority to reduce or prevent product hazards. Pub. L. No. 92-573, § 30(d), 86 Stat. 1207, 1231 (1972). In 1976 Congress amended § 30(d) to give the Commission discretion to use the CPSA instead of the other acts when it found by rule that it was "in the public interest" to do so. Pub. L. No. 94-284, § 16, 90 Stat. 503, 510 (1976). Despite the Commission's respectable record under the transferred acts, and the statutory preference for their use over the CPSA, most oblulose insulation,[207] the Commission developed two others without using the offeror process (unvented space heaters and omnidirectional citizens' band antennas),[208] and offerors developed four (swimming pool slides, bookmatches, architectural glazing material, and power lawn mowers).[209] Offerors also developed standards for two other products — television sets and miniature Christmas tree lights — but the CPSC terminated these proceedings because industry upgraded its voluntary standards as a result of the proceedings, thereby making mandatory rules unnecessary.[210]

Rulemaking did prove to be a highly democratic and visible process that attracted considerable congressional and public scrutiny. With this scrutiny came harsh criticism, which often focused narrowly on the CPSC's rulemaking failures and ignored its other less visible regulatory activities.[211]

D. Reflections on the Process

1. A Lengthy and Costly Process

The Commission's difficulties in issuing product safety standards were due partly to problems inherent in the standard-setting task, problems which neither the NCPS nor Congress had anticipated.[212] They were also due to the unexpected problems arising from the CPSA's complex procedural requirements for standard setting.

The offeror process proved to be far more costly and time-consum-

---

servers continued to judge the Commission largely on the basis of the number of standards it had issued under the CPSA. *See, e.g., infra* note 211 and accompanying text.

[207] *See* 16 C.F.R. §§ 1209.1-1209.11 (1982) (mandated by the Emergency Interim Consumer Product Safety Standard Act of 1978, 15 U.S.C. § 2082 (Supp. V 1981)).

[208] *See* 16 C.F.R. §§ 1212.1-1212.9 (1982) (unvented space heaters); 47 Fed. Reg. 36,201 (1982) (to be codified at 16 C.F.R. §§ 1204.1-1204.17) (omnidirectional citizens' band antennas).

[209] *See* 16 C.F.R. §§ 1207.1-1207.12 (swimming pool slides, developed by the National Swimming Pool Institute, an industry group); *id.* §§ 1202.2-1202.7 (bookmatches, developed by the American Society for Testing Materials, a standards-writing organization, in conjunction with the NCL); *id.* §§ 1201.1-1201.7 (architectural glazing material, developed by the Consumer Safety Glazing Committee, an industry group); *id.* §§ 1205.1-1205.8 (power lawn mowers, developed by Consumers Union, a non-profit consumer organization and publisher of *Consumer Reports*).

[210] For a brief history of the development and acceptance of a voluntary standard for miniature Christmas tree lights, see *infra* notes 242-52 and accompanying text. The CPSC selected Underwriters Laboratories to be the offeror for television receivers, 40 Fed. Reg. 24,043 (1975), and a year later it submitted its recommended standard to the Commission. In the course of evaluating the offeror's proposal, the Commission determined that due to an upgraded voluntary industry standard and a decline in television safety-related incidents, it would terminate its development of a standard to address the risks of shock, implosion, and mechanical hazards. 42 Fed. Reg. 57,335 (1977).

[211] *See generally* 1978 HOUSE INSULATION REPORT, *supra* note 142; 1977 GAO REPORT, *supra* note 114; *Apr. 1977 Senate Oversight Hearings, supra* note 121. *See also supra* note 206 *and infra* notes 261-74 and accompanying text (descriptions of other CPSC regulatory activities).

[212] A number of the hazardous products identified by the NCPS were susceptible to product safety standards involving modest changes in product design, such as adding slats to the sides of baby cribs to prevent strangulation, adding available safety features to household ladders and hot-water vaporizers, improving safety packaging for household chemicals, and adding a well-known safety mechanism (at a cost of only five dollars) to wringer washing machines. *See* NCPS FINAL REPORT, *supra* note 19, at 20-33. The NCPS urged that the "writing of safety standards must not drag on for *months.*" *Id.* at 7 (emphasis added). *But see supra* note 22 (cautionary note sounded by one NCPS commissioner).

ing than anticipated. The average time expended from NOP to final rule for the four mandatory standards issued under the offeror process was 1042 days — almost four times the statutorily prescribed period of 270 days.[213]

Delays occurred at each stage of the process. The offerors exceeded their deadlines to develop initial proposed standards — although in some cases not by very much. The offerors took 171 days for architectural glazing materials;[214] 144 days for pool slides;[215] 290 days for lawn mowers;[216] and only 100 days for bookmatches, though the Commission later allowed the offeror to take more time to modify its proposal.[217]

The Commission's evaluation of the offerors' proposals, which was to take 60 days, or half as much time as the offerors' work, took much longer than the first stage. The Commission took roughly a year to evaluate the proposed standard for architectural glazing material;[218] one and one-half years for the matchbook proposal;[219] 108 days for the swimming pool slide proposal;[220] and almost two years for the lawn mower proposal.[221]

Even the final stage of the process, which was governed by informal rulemaking procedures and was to take only 60 days, consumed on an average nearly four times the statutory period. Again the range of time varied, from 126 days for the swimming pool slide standard to 649 days for the power mower standard.[222]

Because the process was so lengthy, it was also costly for the Commission, the offerors, and the other participants. The CPSC was authorized to contribute to the development of standards but had a limited budget. Its payments to offerors — the vast portion of which went to the consumer organization offerors, National Consumers League and Consumers Union[223] — did not cover all their expenses. As a result, Consumers Union, which was only partially reimbursed for its costs in developing the lawn mower rule, subsequently indicated that it probably would not be an offeror in any future proceedings.[224] Standards organizations also found it burdensome to participate in the process. Underwriters Laboratories contributed $250,000 to the development of the television receivers standard, and the American Society for Testing Materials absorbed most of the costs of developing the matchbook standard, amounting to $180,000.[225] In the long run, in the absence of greatly increased funding by the CPSC, the high costs of the offeror process very likely would have made it affordable only to industry groups with an economic stake in the outcome.[226] Public participation would have become, to an overwhelming degree, industry participation.

---

[213] Pool slides required 570 days; architectural glazing, 955 days; matchbooks, 974 days; and lawn mowers, 1670 days. The NOP for swimming pool slides was published June 28, 1974 (39 Fed. Reg. 24,028), and the final rule was published Jan. 19, 1976 (41 Fed. Reg. 2742). The NOP for power lawn mowers was published July 22, 1974 (39 Fed. Reg. 26,662), and the final rule was published Feb. 15, 1979 (44 Fed. Reg. 9989). The matchbook proceeding ran from Sept. 4, 1974 (39 Fed. Reg. 32,050) to May 4, 1977 (42 Fed. Reg. 22,656). The NOP architectural glazing material was published on May 28, 1974 (39 Fed. Reg. 18,502), and the final rule emerged on Jan. 6, 1977 (42 Fed. Reg. 1441).

[214] OPPE Staff Report, *supra* note 168, at 1-2.

[215] *Id.*

[216] *Id.*

[217] *Id.* at 1-2, D-21.

[218] *Id.* at 1-2.

[219] *Id.*

[220] *Id.*

[221] 42 Fed. Reg. 23,052, 23,053 (1977). See Appendix for an in-depth look at this stage of the process.

[222] The elapsed time between publication of the proposed and final safety standards was as follows: swimming pool slides: from Sept. 15, 1975 to Jan. 19, 1976 (41 Fed. Reg. 2742 (1976)); power mowers: from May 5, 1977 to Feb. 15, 1979 (44 Fed. Reg. 9989 (1979)); architectural glazing material: from Feb. 11, 1976 to Jan. 6, 1977 (42 Fed. Reg. 1441 (1977)); and matchbooks: from Apr. 1, 1976 to May 4, 1977 (42 Fed. Reg. 22,656 (1977)).

2. *Why So Slow?*

The Commission's failure to meet most of its statutory deadlines is understandable. The deadlines were unrealistically short and could not accommodate the varying degrees of difficulty posed by different standard-setting projects.[227] Congress should have expected all but the simplest standard to require more development time than that allowed. It is not so easy to understand, however, why the proceedings required three and four years to complete. A study of the process suggests the following reasons for delay:

(i) Inexperienced Management: Both the Commission and the offerors were inexperienced and had to experiment with the process by trial-and-error. Early offerors had no established framework in which to work but had to develop an organization and management system from scratch. The Commission adopted a "hands-off" policy to avoid interfering with the offerors' work, and thus provided little guidance to the first offerors.[228]

---

[223] Offerors under the CPSA received $574,680; an additional offeror, selected under the FHSA to develop a standard for playground equipment, received $91,620, for a total of $666,300. Interview with Barbara Rosenfeld, Director of Public Participation, CPSC, in Washington, D.C. (July 15, 1981). Of the total sum under CPSC, Consumers Union received $250,924 for the lawn mower rule; the NCL received $196,811 for the miniature Christmas tree light standard; and offerors used the remaining funds in the development of standards for televisions, architectural glass, matchbooks, and swimming pool slides. *Id.*

[224] *Consumer Product Testing Act: Hearings Before the Subcomm. for Consumers of the Senate Comm. on Commerce,* 94th Cong., 1st Sess. 23 (1975). Peter Schuck of Consumers Union stated that it was also unlikely that any consumer group except a large one like Consumers Union would have the resources necessary to be an offeror. *Id.*

[225] OPPE Staff Report, *supra* note 168, at 4-31. The estimated costs to industry of participating in the development of standards had also been high — over $1 million for the lawn mower industry, almost $500,000 for the architectural glass industry, and $150,000 for the major producer of swimming pool slides. *Id.* at 4-30 to 4-31.

[226] Consumer groups thought that full funding would be necessary for them to be offerors in the future. *Id.* at 4-36. Some thought that because standard setting was essentially a governmental function it should be fully supported by public funds. *Oct. 1977 Senate Oversight Hearings, supra* note 81, at 224 (testimony of Peter Schuck of Consumers Union).

[227] *See supra* notes 189-90 and accompanying text.

[228] OPPE Staff Report, *supra* note 168, at 1-6.

(ii) Broad Projects: The Commission asked offerors to address a wide range of product-associated risks of both major and minor consequences.[229] In theory, the broad approach was preferable to a narrower one because it promised a more expedient solution. It allowed the offeror to develop a single comprehensive product standard that would encompass interrelated hazards and avoid piecemeal treatment of a product.[230] In practice, however, the breadth of the rulemaking projects considerably lengthened the standard-development process.[231]

(iii) Inadequate Data: The projects required the offerors to address a large number of hazards for which there was insufficient data on how product-related injuries had occurred.[232] Without such data, offerors had difficulty devising adequate remedies. This difficulty also increased the time needed to develop standards.[233]

(iv) Public Participation Requirements: The Commission interpreted the statutory provision requiring the participation of "interested persons" to mean that all interested persons must be allowed to participate in standard development.[234] Given the projects' broad scope and complexity, inclusion of large numbers of persons in the proceedings significantly increased the time required to complete them.

---

[229] The Commission's list of hazards associated with power lawn mowers, for example, ranged from the "potential" for hearing loss from excessive noise to lacerations, amputations, or death from contact with rotating blades. 39 Fed. Reg. 26,662 (1974). *See also infra* notes 318-20 and accompanying text (discussion of lawn mower hazards). The risks identified for swimming pool slides ranged from quadraplegia to collisions between slide and pool users. 39 Fed. Reg. 37,804 (1974).

[230] OPPE Staff Report, *supra* note 168, at 3-1 to 3-2. The Commission based its policy on the notion that "the consortium of industry, consumers and government could lead to new, innovative solutions to hazards" that were not yet well understood at the outset of the process. *Id.* at 3-2.

[231] *Id.* No known feasible remedy existed for some hazards, and lengthy periods of time were spent in the attempt to find new solutions. For example, the NOP for architectural glass identified risks of injuries from doors, windows, shower doors, and bathtub enclosures. 39 Fed. Reg. 18,502, 18,503 (1974). A voluntary standard existed for doors but not for windows, and there was no ongoing effort to develop a standard for windows. The offeror, which had been working since 1969 on standards for doors but had done no similar work on windows, indicated at the outset that addressing window hazards would require an additional five months. OPPE Staff Report, *supra* note 168, at 3-7. Although the offeror submitted a proposal, the Commission decided to eliminate the window hazards project. *Id.* Grouping the window hazards with the door hazards was detrimental to the offeror process for it diverted the offeror's attention from the more promising remedies while it worked on the less feasible ones. This effort delayed the process, increased its costs, and in the end produced no viable solution. *See also infra* notes 430-33 and accompanying text in the Appendix (scope of lawn mower standard greatly reduced in the final stages of the proceeding to make it manageable and to permit issuance of the standard in a reasonable time).

[232] The NOP for the pool slide standard identified falling from slide ladders as a hazard, but scant data existed to indicate that it was a serious safety problem. *Cf.* OPPE Staff Report, *supra* note 168, at 3-2 to 3-3 (general criticism of Commission documentation of injuries). Recognizing this absence of data, the CPSC indicated that the offeror would have to study the "human factors" having a bearing on slide safety. 39 Fed. Reg. 18,502 (1974). The Commission also identified risks in the matchbook standard process for which there was virtually no supporting data, including risks from delayed ignition, spontaneous ignition, and afterglow of extinguished matches. OPPE Staff Report, *supra* note 168, at 3-5.

[233] Offerors for the architectural glass and matchbook standards spent considerable time developing data. OPPE Staff Report, *supra* note 168, at 3-13. The matchbook offeror hired a consultant to "pore through Commission data" to develop risk analysis, and the architectural glass offeror also spent considerable time verifying the representative nature of the Commission's in-depth case studies. *Id.*

A further discussion of the Commission's difficulties in implementing the offeror process is contained in the case study of the lawn mower standard in the Appendix.

3. *Final Rules Undone*

Despite the extraordinary levels of public participation throughout the standard-setting process, much of it by business,[235] affected industry members were unhappy with the mandatory standards that finally issued from the offeror process. They successfully challenged major portions of the four standards in the courts, at the Commission through the petitioning process, and in the Congress. No standard remained intact. Courts of appeals set aside major provisions of the swimming pool slide and matchbook standards;[236] the Commission repeatedly revised the architectural glass standard in response to a string of petitions;[237] and Congress altered the power lawn mower standard, which had withstood judicial review substantially intact,[238] in response to industry lobbying.[239] Thus, in the end, despite the enormous efforts expended to develop appropriate product safety standards, they were all to some extent undone.

4. *Could the Offeror Process Have Worked?*

After initiating its first series of offeror projects, the Commission seldom tried to use the process again.[240] Some believe the process was not given a fair test before the Commission abandoned it and Congress later abolished it.[241] A project begun in 1977 to develop a standard for miniature Christmas tree lights[242] suggests that the process might have worked, although at a high cost and perhaps only in certain limited circumstances.

---

[234] In its procedural regulations implementing the offeror process, the Commission required that offerors permit all interested persons to participate in the standard development either in person or through correspondence. 16 C.F.R. § 1105.5(a) (1981); *see also* 39 Fed. Reg. 16,206, 16,213 (1974) (discussion of comments received by CPSC relating to this requirement). The regulations required the offeror to send its draft standard to all participants for their review and comment. 16 C.F.R. § 1105.8(a) (1981). *See infra* notes 350-56 in the Appendix.

[235] Industry involvement is reflected in the large sums of money business spent in the development process. *See supra* note 225 and accompanying text.

[236] D.D. Bean & Sons, Co. v. CPSC, 574 F.2d 643, 651 (1st Cir. 1978) (matchbooks); Aqua Slide 'N' Dive Corp. v. CPSC, 569 F.2d 831, 844 (5th Cir. 1978) (swimming pool slides).

[237] *See, e.g.,* 45 Fed. Reg. 57,383 (1980) (revoking portions of standards for "glazed panels"); 43 Fed. Reg. 57,594 (1978) (revising the test frame for the standard's impact test and partially revoking the requirement that plastic glazing materials comply with an accelerated environmental durability test); 43 Fed. Reg. 57,244 (1978) (exempting from the standard carved glass, dalle glass, and leaded glass in decorative doors or panels).

[238] Southland Mower Co. v. CPSC, 619 F.2d 499 (5th Cir. 1980). The Court found that the discharge chute foot-probe test was not justified by substantial evidence of record. *Id.* at 527.

[239] Congress, in the agency's appropriation's bill, first extended the standard's date by six months, Pub. L. No. 96-526, 94 Stat. 3050 (1980), and later ordered substantive changes in the final standard, Consumer Product Safety Amendments of 1981, Pub. L. No. 97-35, § 1212(a), 95 Stat. 703, 724. *See infra* notes 476-80 in the Appendix.

[240] The only offeror process begun after 1975 was the miniature Christmas tree lights project. 42 Fed. Reg. 17,154 (1977).

The National Consumers League (NCL) received $196,811 from the Commission to develop the Christmas tree light standard.[243] NCL developed the standard, and CPSC reviewed, modified, and published it as a proposed standard in less than eighteen months.[244] As a result of this proceeding the two major industry groups — the National Ornament and Electric Lights Association (NOEL), representing importers of lights, and Underwriters Laboratories (UL), representing domestic manufacturers — agreed to upgrade their existing voluntary standards to meet the proposed standards.[245] Ultimately, the Commission withdrew its proposal when it became convinced that industry would voluntarily comply with the upgraded standards.[246]

This project's development stage was successful for several reasons. At the outset of the proceeding the Commission narrowly confined the project to the two most serious hazards posed by the product.[247] Also, the Commission staff provided extensive guidance to the offeror at the beginning of the development process.[248] NCL had assisted in developing the matchbook standard and was thus an experienced offeror.[249] The project director, David Swankin, was a skilled manager who worked well with diverse interest groups and hired consultants with strong technical expertise for the project.[250] The product was not complex like power mowers, and an existing voluntary standard served as a good starting point.[251] Industry members were motivated to find a solution that they could adopt as a voluntary standard.[252] Under these circumstances — improved CPSC procedures, a skilled offeror, a cooperative industry, and a less complicated product — the offeror process worked well.

---

[241] Several participants in the offeror process thought the process had merit and gave it high marks for its fairness and its involvement of all interested persons. Interview with David Swankin, attorney and consumer advocate, in Washington, D.C. (Jan. 26, 1982); Telephone Interview with George Papritz, Senior Engineer for Standards, Consumers Union (May 5, 1982) [hereinafter cited as Papritz Interview].

[242] The Commission published the NOP March 31, 1977. 42 Fed. Reg. 17,154.

[243] *See supra* note 223.

[244] CPSC published its proposed standard on May 3, 1978. 43 Fed. Reg. 19,136. NCL had submitted its proposed standard on the day its development period ended — November 16, 1977. *Id.* at 19,137.

[245] 46 Fed. Reg. 17,788, 17,789 (1981). NOEL agreed to amend its voluntary standard to meet the standard submitted by NCL, and Underwriters Laboratories (UL) agreed to modify its standard to include nearly all the requirements of the CPSC's proposed standard. *Id.*

[246] 46 Fed. Reg. 45,940 (1981).

[247] The NOP identified fire and electrical shock as the hazards the offeror was to address. 42 Fed. Reg. 17,154, 17,155 (1977). The NOP also analyzed existing voluntary standards and identified areas where they were acceptable. It suggested promising approaches to solving the injury problem and in general provided far more information than had previous NOP's to guide the offeror in its subsequent standard development. *Id.* at 17,156-59.

[248] *Id.* at 17,154.

[249] *See supra* note 209 and accompanying text.

[250] Interview with Melvin Spencer, CPSC Office of Program Management, in Bethesda, Md. (June 10, 1982) [hereinafter cited as Spencer Interview]; Interview with Carl Blechschmidt, CPSC Office of Program Management, in Bethesda, Md. (Jan. 7, 1982).

If Congress had given the Commission discretion to use the offeror procedure selectively, the agency might have found similar situations (although probably few in number) in which the procedures could have been successful.[253] In 1981, however, Congress chose to abolish the procedure altogether.

E. Alternatives to Mandatory Standards

As the Commission began to recognize the limitations and flaws in the offeror process, it increasingly turned to more cost-effective regulatory tools available under the CPSA — section 8 bans and section 15 recalls. It also encouraged the development of voluntary standards.

1. Bans

The Commission's authority under section 8 to ban products from the market was designed as a remedy to be used only when feasible consumer product safety standards would be inadequate to protect the public.[254] It proved to be a very useful enforcement tool. The informal rulemaking procedures for banning a product did not include the offeror process; thus, the Commission could promulgate a ban more expeditiously than a standard.[255] And, artfully crafted, the ban could be the equivalent of a standard, as demonstrated by the Commission's "ban" under the FHSA on bicycles that did not meet specified safety standards.[256]

The advantages of the ban's streamlined procedures encouraged the Commission to use it rather than standards in several areas, most notably in its regulation of chronic hazards,[257] an area which the Commission has given top priority. [258] The Commission also used the ban effectively to remove unstable refuse bins from the market.[259]

---

[251] Spencer Interview, *supra* note 250.

[252] *Id.*

[253] *See supra* note 241. The process would have remained a costly approach to product safety, however, and its cost effectiveness questionable. Given the favorable conditions for addressing the Christmas tree light hazard, the Commission no doubt could have completed the project promptly and without the considerable added expense involved in using the offeror.

[254] 15 U.S.C. § 2057 (1976 & Supp. V 1981).

[255] Upon a finding that a product presented an unreasonable risk of injury and that no standard would adequately protect the public from the risk — findings the Commission itself could make without invoking the offeror process — the Commission could propose the ban and proceed with informal rulemaking (plus oral comment) under § 9 of the CPSA. *Id.* § 2058(a)(2) (1976) (amended 1981).

[256] 16 C.F.R. §§ 1500.18(12), 1512.1-1512.20 (1982).

[257] *See* Merrill, *CPSC Regulation of Cancer Risks in Consumer Products: 1972-1981,* 67 VA. L. REV. 1261, 1277 (1981). However, the Fifth Circuit in Gulf South Insulation v. United States CPSC, No. 82-4218 (5th Cir. Apr. 7, 1983), found that the Commission's ban on urea-formaldehyde insulation was not supported by substantial evidence on the record. Slip Op. at 3638-44.

[258] *Id.* at 1372.

[259] 16 C.F.R. §§ 1301.1-1301.8 (1982).

Had the procedural differences between issuing standards and bans remained in force, the Commission might have increasingly used the ban as a regulatory tool. The 1981 amendments to the CPSA, however, made the procedures for issuing bans identical to the more complicated standard-setting process.[260] Thus the Commission no longer has reason to prefer the ban to standards.

2. *Recalls*

The Commission's authority under section 15 to order the recall, repair, replacement, and refund of consumer products that present a "substantial product hazard" and to require product sellers to report products that "could" create such a hazard[261] has also been a surprisingly effective enforcement tool. Since 1973, the Commission has generated 2500 product recalls under section 15 involving over 100 million items,[262] thereby eclipsing the statute's other enforcement provisions in a way not envisioned by its architects.

Contrary to expectations,[263] the case-by-case approach turned out to be a speedier and less costly enforcement tool than rulemaking under the offeror process.[264] Unlike rulemaking, section 15 can be used in a narrowly focused way to correct specific product hazards that are often related to quality control problems and that usually involve a single manufacturer.[265] In the vast majority of cases, the product manufacturer agrees to correct the safety problem without litigation.[266] It is thus a far less politically charged avenue for reducing unreasonable product risks than standard setting. In the political climate of the 1980's, section 15, no doubt, will continue to be an important enforcement tool for the Commission.[267]

---

[260] Consumer Product Safety Amendments of 1981, Pub. L. No. 97-35, § 1203, 95 Stat. 703, 704 (codified at 15 U.S.C. § 2058 (Supp. V 1981)).

[261] 15 U.S.C. § 2064 (1976 & Supp. V 1981).

[262] *1981 House Hearings, supra* note 66, at 22 (statement of Susan B. King, former CPSC Chairman).

[263] *See supra* notes 170-75 and accompanying text.

[264] Madden, *Consumer Product Safety Act Section 15 and Substantial Product Hazards,* 30 CATH. U.L. REV. 195, 196 (1981).

[265] Interview with Catherine C. Cook, former Director of Compliance and currently Assistant to CPSC Chairman Nancy H. Steorts, in Washington, D.C. (Dec. 29, 1981).

[266] *Id.*

[267] Partly because the CPSC sought solutions to individual product hazards under § 15 rather than through its standard-setting authority, it was able to avoid the type of harsh public criticism focused in recent years on the FTC for its broad industry-wide rulemaking activities affecting such groups as funeral-home owners and used-car dealers. For a good account of the FTC's travails, see Address by Michael Pertschuk, Stoning the National Nanny: Congress and the FTC in the Late 70's, School of Business Administration, University of California at Berkeley (Nov. 9, 1981).

In contrast, the CPSC's relatively small number of standards, which was a source of criticism in the early 1970's, by 1981 was being characterized favorably as "a sign of the agency's strength and maturity." *1981 House Hearings, supra* note 66, at 336 (testimony of Stuart M. Statler, Acting CPSC Chairman).

3. Voluntary Standards

The Commission has also encouraged voluntary standards development.[268] From 1978 to 1981, industry collaborated in varying degrees with the Commission in thirty-seven voluntary standards projects, whereas the Commission set only seven mandatory standards.[269] Voluntary standards were expected to prevent more injuries and deaths than mandatory standards.[270]

In some cases the imminent prospect of a mandatory standard may have stimulated the development of voluntary standards.[271] In a few proceedings, most notably for chain saws and upholstered furniture, voluntary efforts have been disappointingly slow, despite threatened action by the Commission.[272] But in many cases, industry developed standards without the threat of rulemaking.[273]

In general, voluntary standards development has been a positive result of the Commission's work, though it has not been cost free[274] and has not always proceeded expeditiously or "voluntarily." With severe budget cuts limiting the agency's ability to develop mandatory standards, the Commission may lose some of its effectiveness in influencing voluntary standard development in the future.

---

[268] *1981 House Hearings, supra* note 66, at 338-40 (testimony of Stuart M. Statler, Acting CPSC Chairman).

[269] CPSC Press Release No. 81-11 (Mar. 13, 1981). Only seven major mandatory standards have come into effect or been promulgated since 1978. *Id.*

[270] The seven mandatory standards when fully implemented are expected to prevent 90,000 injuries and 100 deaths; the 37 voluntary standards projects are expected to prevent 125,000 injuries and about 200 deaths. *Id.*

[271] *Cf. supra* note 210 (termination of Commission proceeding upon improvement of voluntary industry standards).

[272] In December 1977, the Commission denied a petition for a mandatory standard for chain saws in favor of proceeding with a joint effort with the Chain Saw Manufacturers Association (CSMA) to develop a voluntary performance standard. 46 Fed. Reg. 26,263 (1981). CPSC and CSMA agreed to an 18-month development plan and by the end of that period CSMA submitted a standard to the Commission, which found it to be deficient in several respects. *Id.* at 26,264. After further informal efforts failed to develop a voluntary standard that would correct these deficiencies, the Commission decided to proceed with the development of a mandatory standard. It published an advance notice of proposed rulemaking for chain saws on May 5, 1982, pursuant to the new two-step procedures required by the 1981 CPSA amendments. 47 Fed. Reg. 19,369 (1982). Thus after almost four and one-half years, the Commission has started the mandatory standard-setting process. Of course, the time spent on the voluntary effort has not been wasted, because both industry and the CPSC have gained expertise with respect to relevant safety features, but one wonders if the voluntary efforts would have moved more quickly if the Commission had begun its development of a mandatory standard earlier. *Cf.* CPSC Decision on Petition for Promulgation of a Consumer Product Safety Standard to Reduce Chain Saw Kickback, Doc. No. 77-10, 15-19 (Apr. 27, 1978) (Comm'r R. David Pittle, dissenting) (expressing "misgivings" about CSMA's ability to draft an adequate performance standard in an 18-month period and his expectation that time would be lost if the voluntary effort were terminated after 18 months and a mandatory standard-setting procedure undertaken).

Voluntary standards development for the upholstered furniture industry has been equally slow. In November 1979, the Commission deferred action for one year on a proposed mandatory flammability standard for upholstered furniture in the hope that the industry would develop an adequate voluntary standard, but 18 months later the staff recommended yet another year for the voluntary effort. 9 PROD. SAFETY & LIAB. REP. (BNA) 425 (1981).

[273] Since 1973, the CPSC staff has collaborated with industry in 83 voluntary standards projects. This work resulted in the publication of 61 new standards and the revision of 24 standards. *1981 House Hearings, supra* note 66, at 339-40 (statement of Stuart M. Statler, Acting CPSC Chairman).

[274] Voluntary standard setting can be very "staff-intensive." *1981 House Hearings, supra* note 66, at 35. Former CPSC Chairman Susan King testified that voluntary standard setting is as time consuming as the development of mandatory standards. *Id.*

F. Offeror Process Abolished

As late as 1978, Congress was chastising the Commission for its long delays in issuing product safety standards.[275] In that year it amended section 7 to authorize the Commission to forego the offeror process in order to expedite standards development.[276] By 1981, the political winds had shifted so significantly that Congress was criticizing the Commission because it had "over used mandatory product safety standards and bans," rather than finding voluntary solutions.[277] In the Consumer Product Safety Amendments of 1981 Congress directed the Commission to rely on voluntary rather than mandatory safety standards whenever they would be adequate to reduce risks.[278]

The amendments abolished the offeror process and substituted an elaborate set of requirements for the issuance of safety standards.[279] The new procedures require the Commission to consider voluntary standards throughout the process. As the first step in the process, the Commission must publish an advance notice of proposed rulemaking (ANPR) that includes a summary of the alternative approaches the Commission is considering, including voluntary standards; a description of any voluntary standards it has preliminarily rejected and the reasons for doing so; an invitation to interested persons to submit existing standards as a proposed standard; and an invitation to persons to submit statements of intention to modify or develop a voluntary standard to address the risk, together with a description of the plan to do so.[280]

The amendments require the Commission to provide technical and administrative assistance to groups that propose to develop a standard.[281] The level of assistance may reflect such factors as the Commission's resources, the group's likelihood of success in developing a voluntary standard within a reasonable time, the prospects for wide compliance with the standard, and the group's use of procedures to include participation by interested persons in the standard development.[282] This assistance scheme bears some resemblance to the offeror process.

---

[275] Congress expressed concern that after five years, only three standards had been issued under CPSA — for architectural glass, swimming pool slides, and matchbooks. H.R. REP. No. 1164, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 9435, 9435.

[276] Act of Nov. 10, 1978, Pub. L. No. 95-631, § 3(a), 92 Stat. 3742, 3743 (repealed 1981). Congress directed the Commission to consider the nature of the risk, the Commission's expertise, and its resources and priorities in deciding whether to develop a standard on its own. *Id.* § 3(b), 92 Stat. at 3743 (repealed 1981). The Commission was to publish its decision in the *Federal Register* and allow a 30-day period for public comment on the decision.

[277] S. REP. No. 102, 97th Cong., 1st Sess. 2 (1981).

[278] Pub. L. No. 97-35, § 1202(b), 95 Stat. 703, 703-04 (1981) (codified at 15 U.S.C. § 2056(b) (Supp. V 1981)). Congress also amended the statutory provisions to limit standards to performance requirements or warnings or instructions. *Id.* § 1202(a), 95 Stat. at 703 (codified at 15 U.S.C. 2056(a) (Supp. V 1981)). No design standard can be issued. The original act expressed a preference for, but did not mandate, performance standards. *Supra* note 200 and accompanying text.

[279] Pub. L. No. 97-35, § 1203, 95 Stat. 703, 704-13 (1981) (codified at 15 U.S.C. § 2056(a) (Supp. V 1981)).

[280] 15 U.S.C. § 2058(a) (Supp. V 1981).

In the second procedural step the Commission is to publish its proposed rule accompanied by a cost-benefit analysis of the proposed rule, a shorter version cost-benefit analysis of rejected alternative approaches, and the reasons it rejected any voluntary standards.[283]

In the last stage of rule promulgation, the Commission must provide a final cost-benefit analysis of both its rule and the rejected alternatives. When a voluntary standard exists that addresses the same risk as the mandatory rule addresses, the Commission must find that the voluntary standard is inadequate or that substantial compliance with it is unlikely.[284] Further, if at any time during the process the Commission finds that a voluntary standard developed in response to its ANPR is adequate to reduce the product risks and that there will be substantial compliance, it must terminate any ongoing proceedings for a mandatory rule and rely on the voluntary standard.[285]

These elaborate provisions seem well designed to discourage the Commission from developing mandatory standards. But their practical impact may be less than expected, since the Commission has already increasingly encouraged voluntary standards and used regulatory tools other than standard setting to correct product hazards.[286] The Commission's success with voluntary standards, however, has been aided in some measure by its ability and willingness to proceed with mandatory standards if voluntary efforts lag.[287] By mandating agency deference to voluntary standards, the 1981 amendments may slow their development. The only outside groups that are likely to develop voluntary standards under the new procedures are industry groups with an economic stake in the outcome and interests that may be best served by delay. Much will depend on how the Commission implements the new provisions. If the Commission demonstrates a willingness to go forward with mandatory standards when private efforts lag — as it recently did in the development of the chain saw standard[288] — it may be able to continue to effectively prod the development of acceptable voluntary standards.

---

[281] *Id.* § 2054(a)(4).

[282] H.R. CONF. REP. NO. 208, 97th Cong., 1st Sess. 884 (1981). Given the budget cutbacks, the Commission's assistance may be quite scant.

[283] 15 U.S.C. § 2058 (Supp. V 1981).

[284] *Id.* § 2058(f). In addition to the many requirements the Commission must meet before issuing a safety rule, it is prohibited from issuing a product safety rule unless it finds, *inter alia,* that the rule is reasonably necessary and in the public interest and that compliance with any existing voluntary standard would be inadequate to protect the public from the risk. *Id.*

[285] *Id.* § 2058(b)(2).

[286] *See supra* text accompanying notes 262, 268-70.

[287] *See supra* text accompanying note 271. *But see supra* note 272 and accompanying text (delays in chain saw proceeding).

Although the amendments do not require the Commission to stay its hand while voluntary efforts proceed, it is questionable whether the Commission can financially and politically do otherwise. Financially, it may be wasteful to put additional resources toward a mandatory standard while any voluntary effort is ongoing.[289] Politically, the congressional preference for voluntary standards is now so strong that it may be unwise to move toward a mandatory standard until voluntary efforts have been exhausted.[290]

IV. Conclusion

A. An Overview

1. Delegation of a Difficult Task

In delegating to the CPSC broad legislative authority to regulate product safety, Congress assigned it an inherently difficult task requiring technical, political, and economic judgments and the delicate balancing and weighing of conflicting and competing interests — responsibilities that Congress itself has had difficulty fulfilling.[291] Thus it was inevitable that the new agency would have difficulty carrying out its assigned task. Even with less complicated procedural requirements than the CPSA's, it is unlikely that the new agency could have quickly issued a large number of safety standards. The procedures imposed on the agency made such an outcome impossible.

2. Expectations About Standards

The CPSC was a product of the Consumer Decade, a period when many thought that the federal government could solve a wide range of consumer problems through broad regulatory programs. The NCPS Final Report, which had overstated both the extent of the product safety problem and the remedial potential of regulatory action,[292] created high expectations for the new consumer agency. Although a well-documented, careful study, the Report was a work of advocacy aimed at developing support for specific proposed legislation.[293] The Report convinced Congress and later the CPSC itself that mandatory safety standards were the key to solving the product safety problem.[294]

---

[288] *See supra* note 272. The CPSC staff will continue to work with industry in the voluntary process, but will proceed simultaneously with the formal proceedings "in order to provide . . . the flexibility to pursue expeditiously either a voluntary or mandatory regulatory approach, whichever is eventually found to be more appropriate." Letter from CPSC Chairman Nancy Steorts to Rep. Edward P. Boland (July 19, 1982).

[289] Far greater effort is required to prepare a mandatory standard that will withstand judicial scrutiny under the substantial evidence test than is required to produce a voluntary standard. *See* CPSC Decision on Petition for Promulgation of a Consumer Product Safety Standard to Reduce Chain Saw Kickback, Doc. No. 77-10, 13-14 (Apr. 27, 1978) (Comm'r R. David Pittle, dissenting).

[290] *But see supra* note 288 and accompanying text. In the case of chain saws, at least, the Commission was willing to proceed with the development of a mandatory standard, but the voluntary efforts had been underway for a number of years before the Commission finally took this step. *See supra* note 272.

[291] Congress had previously exercised its authority through narrow product safety legislation. *See supra* notes 40-45 and accompanying text.

The heightened expectations helped secure the CPSA's enactment. Later these same expectations became the unrealistic goals by which Congress, industry, and consumers judged the agency's performance.

3. *Measures of Agency Performance*

Critics of the CPSC should have considered the number of safety standards issued under the CPSA as only one of several measures of the Commission's effectiveness. Unfortunately, it became almost the sole measure. Critics largely ignored the standards and regulations that the Commission issued under the transferred statutes, as well as its other enforcement activities.[295] They often overlooked that the Commission's overall performance was roughly on a par with other regulatory agencies.[296]

A better assessment of the CPSC's effectiveness would have been the extent to which the Commission had eliminated preventable injuries associated with consumer products under its jurisdiction. Although such an assessment would have been difficult to quantify, especially in the Commission's early years, rough estimates would have provided a more meaningful indication of the agency's overall effectiveness than did a measure so mechanical as the number of mandatory standards the agency had issued under the CPSA.

---

[292] *See supra* notes 23-25, 56 and accompanying text.

[293] *See supra* notes 13-16 and accompanying text.

[294] *See supra* notes 79, 169 and accompanying text.

[295] *See supra* notes 206, 211 and accompanying text.

[296] The CPSC was not the only agency criticized for issuing few standards and for consuming considerable time in the rulemaking process. After an initial spate of standards by the National Highway Traffic and Safety Administration (NHTSA) (29 standards between 1966 and 1969 which were largely enactments of standards previously adopted by the General Services Administration and the Society of Automotive Engineers), the number of standards issued each year fell sharply — three in 1971, six in 1972, two in 1973, zero in 1974, and one in 1975. Staff of Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess., Report on Federal Regulation and Regulatory Reform 167 (Comm. Print 1976) [hereinafter cited as House Reform Report]. "What NHTSA has not done speaks louder than the few regulatory actions it has produced in recent years." *Id.* at 168.

Congress also criticized the FTC for delays in rulemaking and for issuing few rules. In 1974 and 1975 only three rules and two guides became final, and the average amount of time for these efforts, from investigation to final action, was over 42 months. *1976 House Reform Hearings, supra* note 24, at 604 (letter from Rep. Benjamin S. Rosenthal to Subcomm. Chairman John E. Moss).

In its 1976 report on nine regulatory agencies, the House Committee on Interstate and Foreign Commerce ranked the CPSC on a par with the NHTSA, Federal Communications Commission (FCC), and the FDA in terms of "fidelity" to statutory mandate, "quantity and quality of agency activity; effectiveness of agency enforcement programs; and quality of public participation." House Reform Report, *supra,* at 11.

B. *Mandatory Standards*

1. *A Flawed Procedural Framework*

The offeror process compounded the difficulty of the Commission's legislative task by requiring that the initial phase of standards development be delegated to an outside group. The task was too complex for a nongovernmental body, unaccountable to either the Congress or the courts. Furthermore, it was unrealistic to expect offerors to develop standards that would meet the substantial evidence test and reflect the CPSC's policy judgments. Not surprisingly, they failed to do so in almost every instance and the Commission had to substantially rework the proposals.[297] The offerors' work was perhaps more than "a set of troublesome but inconsequential preliminaries" but it fell far short of constituting the "core of the rulemaking process."[298] It was an inefficient and costly process that seldom, if ever, could have been made to work on a cost-effective basis.[299]

2. *Public Participation Procedures*

Critics generally praised the availability of public participation provisions in the offeror process. The Commission tried to assure that consumer interests were represented in the process, but in practice the public participation opportunities mostly benefited business interests which were organized and financially equipped to take full advantage of them.[300] To assure the effective participation of consumer or public interest groups, it is not enough to give them legal rights to participate; they must also be given adequate funding.[301] In the absence of such funding, business interests will continue to be the main beneficiaries of public participation provisions.

3. *Statutory Deadlines*

The CPSA's statutory deadlines for the development of standards were unrealistically short, especially in light of the statute's complex procedural requirements. Neither the NCPS nor Congress had a basis for the belief that safety standards could be developed and promulgated in the statutory nine-month period.[302]

---

[297] *See, e.g., infra* notes 406-17 in the Appendix.

[298] *See* Scalia & Goodman, *supra* note 61, at 908; *supra* text accompanying notes 196-97.

[299] Even the most successful offeror process for miniature Christmas tree lights may not have been cost-effective. The offeror received nearly $200,000 for this project, which did not present a very complex or difficult problem. *See supra* text accompanying notes 243-53.

[300] *See infra* note 356 and accompanying text in the Appendix.

[301] *See supra* notes 224, 226 and accompanying text.

[302] Even the development of a voluntary standard, which involves neither the procedural complexities of the offeror process nor the substantial evidence requirement, generally takes several years to complete. *See infra* note 492 and accompanying text.

Statutory deadlines can be detrimental if they establish unrealistic expectations and goals for judging an agency's performance. If they are used at all (and their usefulness is doubtful) they should at least be set in light of past experience with similar rulemaking efforts.

C. *The Petitioning Process*

Because of its inexperience and failure to set priorities, the CPSC gave petitions unwarranted influence over its early regulatory agenda. Because petitioners usually represent their own narrow economic concerns rather than the public interest,[303] they hardly can be relied upon to ensure that an agency is "safeguarding the public" or doing its job.[304] Indeed they are likely to interfere with an agency's performance of its responsibilities if they are given overly broad legal rights to press their claims for regulatory action. The appropriate role for petitioners is the limited one provided by the APA.

D. *General Reflections on Procedural Reform*

The CPSC's implementation of its statute tended to exacerbate the statute's flaws, making the standard-setting procedure more unworkable and the petitioning process more important than necessary. Many of these difficulties stemmed from the fact that the agency was new and the staff inexperienced. A new agency like the CPSC has to establish itself, set its priorities, test its statute, and experiment with its enforcement tools. Seldom, if ever, should it also be given untested, innovative procedures to implement in its first years of existence.

In general, new administrative procedures like the offeror process should be tested on a limited basis before they are mandated for general use by an agency, for it is nearly impossible to assess in advance the impact of such procedures on the administrative process. Also, it is better not to mandate the use of complex new procedures, but to give agencies the discretion to select those procedures most appropriate for a particular proceeding. Unfortunately, in recent years the trend has been away from giving agencies such discretion. Indeed, Congress has passed or proposed an increasing number of complex rulemaking procedures for mandatory application.[305]

In light of the CPSC's experience in implementing its complex procedures, legislators should approach proposals for major government-wide rulemaking reforms with caution. Even though recent legislative proposals[306] do not mirror CPSC procedures, many would add restrictive and burdensome procedures to the already difficult task of rulemaking under broad legislative mandates. The CPSC's experience should alert lawmakers to the potential pitfalls of such a path.

---

[303] *See supra* note 168.

[304] *See supra* note 87.

[305] *See, e.g.,* Consumer Product Safety Amendments of 1981, Pub. L. No. 97-35, §§ 1202-1203, 95 Stat. 703, 703-13; The Magnuson-Moss Warranty — Federal Trade Commission Improvement Act of 1975, Pub. L. No. 93-637, § 202(a), 88 Stat. 2183, 2193 (codified as amended at 15 U.S.C. § 57(a) (1976)); The Regulatory Reform Act, S. 1080, 97th Cong., 2d Sess. §§ 3-4, 128 CONG. REC. 52,713-21 (1982).

[306] *See supra* note 11.

V. Appendix: A Case Study — The Lawn Mower Standard

To bring the general conclusions about the offeror process into sharper focus, it is useful to study a single standard-setting project. Because the process yielded only four completed projects, none is "typical." The lawn mower standard has been selected because it was the most complex and therefore presented the greatest challenge to the process. Nearly every problem that arose in the lawn mower project occured in at least one other project.

A. Initiation by Industry Petition

On August 15, 1973, the Outdoor Power Equipment Institute (OPEI), an industry trade association, petitioned the Commission to develop a product safety standard for power lawn mowers.[307] OPEI proposed that the Commission adopt the voluntary industry standard that the American National Standards Institute (ANSI) had developed entitled "Safety Specifications for Power Lawn Mowers, Lawn and Garden Tractors and Lawn Tractors."[308]

Well within the 120 days alloted for deciding petitions, the Commission evaluated the risks associated with power lawn mowers and granted the petition.[309] Existing studies and data demonstrated that the risks were numerous and serious. In 1970, the NCPS had identified the power mower as a priority item for government regulation,[310] and the National Electronic Injury Surveillance System had reported over 64,000 injuries from power mowers in 1973 alone.[311]

On the basis of this and other data, the Commission, on November 16, 1973, granted OPEI's petition to commence the development of a product safety standard, and simultaneously denied its request to publish the ANSI standard as a proposed standard. The Commission believed it should open the process under section 7 procedures by inviting members of the public to submit existing standards or offers to develop a new standard.[312]

---

[307] CPSC Petition Log, *supra* note 104, at C-2.

[308] OPEI, Petition for Issuance of Consumer Product Safety Rule 4-6 (Aug. 15, 1973).

[309] CPSC Petition Log, *supra* note 104, at C-2.

[310] NCPS FINAL REPORT, *supra* note 19, at 28-30. It was one of 16 categories of products the Commission concluded presented an "unreasonable hazard to the health and safety of the consuming public." A Public Health Survey had shown from 55,000 to 80,000 consumer injuries associated with power mowers, and HEW had estimated 140,000 injuries annually from power mowers. *Id.* at 29. The NCPS found the existing industry standard inadequate and that one-quarter of the 216 models that the NCPS examined did not comply with the industry standard. *Id.*

[311] Proceeding for Development of Safety Standard, 39 Fed. Reg. 26,662 (1974).

B. Selecting an Offeror

1. Notice of Proceeding Inviting Offers

Section 10(d) of the CPSA provided that when the Commission granted a petition, it was to "promptly" commence the standard-setting procedures.[313] The Commission had granted OPEI's petition, however, before it even had proposed procedures to implement the offeror process.[314] These procedures took longer to formulate than the Commission had anticipated,[315] and it was thus not until July 22, 1974, eight months after the Commission granted the OPEI petition, that it published its Notice of Proceeding (NOP) to develop a consumer product safety standard for power lawn mowers.[316]

As the Commission had done in other cases, it set forth in the NOP a broad range of hazards associated with the product.[317] It included the following risks for both riding and walk-behind power mowers:

> 1. Lacerations . . . and other injuries . . . from operator contact with the rotating blade.
> 2. Lacerations . . . and other injuries . . . caused by objects propelled by the mower blades.
> 3. Lacerations . . . and other injuries . . . from the rolling, slipping, or overturning of power lawn mowers or by failure of power lawn mower brakes or power lawn mower steering mechanisms.
> 4. Burns and other injuries . . . resulting from direct contact with exposed heated surfaces of power mowers or from fires caused by ignition of liquids used as fuels for power lawn mowers.
> 5. Injuries . . . . caused by electric shock from power sources of electrically powered lawn mowers . . . .
> 6. Potential for hearing loss and nonauditory trauma from exposure to excessive noise.[318]

This list included almost all conceivable mower-related hazards — from those that represented seventy-five percent of all power mower injuries (blade contact and thrown objects)[319] to those that represented few injuries (rollovers, steering failures, and excessive noise).[320] The NOP neither ranked the hazards nor established priorities. The offeror apparently was to address all hazards with equal vigor.

---

[312] *Id.*

[313] 15 U.S.C. § 2059(d) (1976) (repealed 1981).

[314] The Commission granted the petition on Nov. 16, 1973, *see* CPSC Petition Log, *supra* note 104, at C-2, and on Jan. 4, 1974, it published proposed procedures governing the offeror process, 39 Fed. Reg. 1152.

[315] The Commission was surprised and somewhat apologetic about the length of time required to promulgate the final procedures. *See* 1974 CPSC ANN. REP. 3-4.

[316] 39 Fed. Reg. 26,662 (1974).

[317] See *supra* notes 229-33 and accompanying text for a description of the contents and effects of the broadly framed NOP's.

[318] 39 Fed. Reg. 26,662 (1974).

[319] OPPE Staff Report, *supra* note 168, at 3-3.

[320] In-depth investigations of 318 power mower injuries revealed that only one injury arose from a steering problem and none was attributable to noise. *Id.* at 3-3 to 3-4.

2. *Offers Submitted*

The CPSC's procedures permitted persons to submit an existing standard or an offer to develop a standard.[321] In its proposal each offeror was to describe its overall plan for developing the standard — including details of its procedures, committee organization, decision-making process, facilities, equipment, and estimated time and personnel requirements.[322] The offeror was also to describe how it would give all interested persons adequate notice of the proceeding and the opportunity to participate in person or in writing in the development of the standard.[323] Thus the preparation of the proposal was itself a sizeable task, and no funding was available to compensate offerors for this preliminary work.[324]

Within thirty days of the NOP for power lawn mowers, four prospective offerors submitted proposals. Two came from companies who offered to develop portions of a standard to deal with specific hazards named in the NOP.[325] The original petitioner, OPEI, again submitted the existing ANSI standard for acceptance but offered also to develop a standard if the Commission rejected the ANSI standard.[326] OPEI sought no funds to cover the $251,000 it estimated would be required to develop the proposal.[327] Consumers Union (CU), a non-profit organization that tests and evaluates consumer products and publishes its results in *Consumer Reports,* also submitted an offer. It had developed considerable expertise in the course of its testing and reporting on power lawn mowers but needed substantial funding to support the development of a standard.[328]

3. *Offer Accepted*

The Commission tentatively accepted CU's offer, but before final acceptance, the staff met with CU to negotiate several changes in the original offer. The Commission wanted to assure more participation by lay, as distinguished from technical, consumers and to reduce the funding for the project.[329] OPEI filed formal objections to CU's offer and also objected to the staff's negotiations with CU.[330] Members of industry complained that OPEI had been treated unfairly in the process.[331]

---

[321] 16 C.F.R. § 1105.5 (1981).

[322] *Id.* § 1105.6. The Commission encouraged a wide variety of organizations to participate as offerors, including ad hoc organizations and individuals. *Id.* § 1105.6(a)(1)-(2).

[323] *See supra* note 234.

[324] Consumers Union spent several months developing its plan of operation, contacting participants, and preparing a preliminary standard. Papritz Interview, *supra* note 241. Mr. Papritz had served as Assistant Project Director in the development of the lawn mower standard.

[325] *See* Submission of Existing Standard as a Consumer Product Safety Standard, Letter from Anthony D. Cennamo, Attorney for J. Masterson & Co., to the Secretary of the CPSC (Aug. 21, 1974); Letter from F.W. Kruse, Pres., Wheel Estates, to the Secretary of the CPSC (Aug. 5, 1974) (available in the CPSC File on the Lawn Mower Standard, Office of the Secretary, CPSC, Bethesda, Md.) [hereinafter cited as CPSC File].

[326] Outdoor Power Equipment Institute, Offer to Develop a Consumer Product Safety Standard for Power Lawn Mowers 23 (Aug. 21, 1974) (available in CPSC File, *supra* note 325) [hereinafter cited as OPEI Offer].

[327] *Id.* at 37.

[328] Consumers Union, Offer to Develop a Proposed Power Lawn Mower Consumer Product Safety Standard 23-24 (Aug. 21, 1974) (available in CPSC File, *supra* note 325) [hereinafter cited as CU Offer].

The offers from both OPEI and CU were sound and the offerors had the technical expertise necessary to develop the standard.[332] However, the Commission may have been particularly interested in selecting CU because it had recently rejected the only other consumer-oriented organization to submit an offer.[333] On September 26, 1974, the Commission voted to accept CU's offer, amended as a result of the negotiations, and to grant CU $66,745, with $25,000 in a contingency fund for testing.[334] Approximately two months had passed since the NOP. Under the statutory deadlines the offeror therefore had less than three months, until December 19, 1974, to complete development of the standard.

C. Offeror Development

1. Organizing the Effort

Consumers Union had proposed that the work be done by two special area committees, the Rotating Blade Committee and the Power Unit and Central Systems Committee.[335] It proposed a separate Central Committee to be the steering, coordinating, and reviewing body. The Central Committee was to consist of about twenty persons — nine consumer representatives, six industry representatives, and several standards development experts with no economic stake in the outcome.[336] Special area committees, consisting of about eight members each, were to do the technical development work and to evaluate the economic and environmental impact of their proposals.[337]

Even before its offer was accepted, CU got off to an early start by circulating for comment to all committee members a preliminary draft standard designed to serve as an "initial discussion document."[338] It had also published in the September issue of *Consumer Reports* a notice inviting participation in the development of the standard[339] and some 400 people had responded.[340] As soon as the CPSC accepted CU's offer in late September, CU mailed its draft standard to those additional participants.[341]

---

[329] Log of Meeting (Sept. 19, 1974) (available in CPSC File, *supra* note 325).

[330] Letter from Dennis Dix, Executive Director of OPEI, to CPSC Chairman Richard Simpson (Sept. 18, 1974) (available in CPSC File, *supra* note 325).

[331] *A Mower Safety Code with a Sharper Edge,* BUS. WEEK, Aug. 11, 1975, at 17-18.

[332] Some CPSC staff members had recommended that OPEI be selected. *See* Note, *supra* note 120, at 1208 n.192. CU had been testing and reporting on power lawn mowers for years, CU Offer, *supra* note 328, at 3, and the industry group had been involved in product safety since its formation in 1952; OPEI Offer, *supra* note 326, at 4.

[333] The Commission had rejected NCL's offer to develop the architectural glass standard. *See supra* note 192.

[334] 39 Fed. Reg. 37,803, 37,804 (1974).

[335] *Id.* at 37,803-04.

[336] CU Offer, *supra* note 328, at 11-12.

[337] *Id.* at 8-9, 12-14.

[338] Letter from Bertram Strauss, CU Project Director, to Alan Ehrlich, CPSC monitor for the development of the lawn mower standard (Dec. 10, 1974) [hereinafter cited as Strauss Letter].

CU proposed to establish a Full Committee which would include all persons who indicated an interest in participating in the process.[342] Early in the process, however, the Full Committee and the Central Committee "apparently became one and the same."[343] CU advised all interested persons of all meetings and sent them complete briefing materials on all proposals so they could provide their views orally or in writing.[344]

Following the offer's informal acceptance in late September, the Full Committee met for several days to review CU's preliminary standard.[345] As a result of these meetings, CU prepared a first draft standard and circulated it to over five hundred persons who then comprised the list of interested persons.[346] In addition, the Full Committee established eight subcommittees of the two area committees to work on the specific hazard areas identified in the NOP: blade contact; thrown objects; grass catchers; brakes and drive train; steering and stability; electric shock; fire and burns; and noise.[347] These subcommittees met twenty-one times throughout October and November and soon discovered that their task was extremely complex. Consideration of one aspect of the proposed standard often produced a series of questions setting off a "chain reaction of required investigations, studies, discussions and tests . . . ."[348] The work of one committee was sometimes contingent on the work of another.[349] The subcommittees also found their work slowed by the attendance of large numbers of participants at their meetings.[350] Subsequently small task forces took on specific projects and the operations became more efficient.[351] While these subcommittees were meeting, CU was receiving a large number of comments from interested persons on its first circulated drafts. CU separated these comments according to hazard area and sent them to the working subcommittees. It was surprised by the number and diversity of the comments, as well as the amount of time and cost involved to solicit and evaluate them.[352]

---

[339] *Mower Safety Standard: Volunteers Wanted,* 39 CONSUMER REP. 637 (1974). The advertisement invited "anyone" interested in the project to participate in order to have the "greatest possible participation . . . by individuals and groups outside [the CU] staff." *Id.*

[340] Strauss Letter, *supra* note 338, at 1.

[341] *Id.*

[342] CU Offer, *supra* note 328, at 9.

[343] OPPE Staff Report, *supra* note 168, at D-30.

[344] CU Offer, *supra* note 328, at 21.

[345] Strauss Letter, *supra* note 338, at 1.

[346] *Id.* at 2.

[347] OPPE Staff Report, *supra* note 168, at D-30 to D-31.

[348] Strauss Letter, *supra* note 338, at 15.

[349] For example, much of the Grass Catcher Subcommittee's work depended on the Thrown Object Subcommittee's resolution of certain problems. *Id.* at 7.

[350] The number of participants in a subcommittee meeting averaged 12 to 13 but ranged up to 20 and 30. OPPE Staff Report, *supra* note 168, at D-32.

[351] The task forces were comprised of three or four people who did testing and wrote proposed requirements for subcommittee review. February Progress Report, Power Lawn Mower Safety Standard, from Bertram Strauss, CU Project Director, to Alan Ehrlich, CPSC (Mar. 10, 1975) (available in CPSC File, *supra* note 325).

In early December, CU asked the Commission to extend the development period deadline six months from December 19, 1974 to June 19, 1975.[353] In support of its request, CU cited the difficulties of organizing the effort, the project's complexities, and the lengthy process involved in obtaining comments on draft proposals. It also sought $90,165 in additional funding to complete the project.[354] On December 20, the Commission granted both requests.[355]

In the six months that followed, the subcommittees and task forces continued their work. As the lengthy process went on, consumer participation diminished and CU had to recruit new consumer representatives. Industry interest, on the other hand, picked up as the standard took form and more businesses became aware of its potential economic impact.[356]

CU prepared and circulated two more draft standards.[357] In May, CU held lengthy public meetings on its third draft and received several hundred comments.[358] In June, CU sought and was granted one more deadline extension to July 17 to give it time to evaluate the enormous number of comments (five times the number expected) submitted on its final draft standard and to prepare the technical rationale for its proposal.[359] On July 17, 1975, CU submitted its proposal to the Commission, almost ten months after its offer was accepted.[360]

---

[352] Strauss Letter, *supra* note 338, at 2. The process involved mail delivery, review time, comment submission, and comment evaluation — all of which took longer than expected. *Id.* at 5.

[353] *Id.* at 1.

[354] *Id.* The offeror estimated that subcommittees would hold approximately 60 meetings during the extension to complete their work. *Id.* at 3, 8.

[355] Minutes of CPSC Executive Session (Dec. 20, 1974) (available in CPSC File, *supra* note 325).

[356] Papritz Interview, *supra* note 241. CPSC continually pressured CU to encourage more consumer participation, and CU made a new effort to recruit consumers for the extra six months. OPPE Staff Report, *supra* note 168, at D-31. The average number of consumers attending each meeting to consider the third draft standard was 10; the average number of industry participants was 31. May Progress Report from Bertram Strauss, CU Project Director, to Alan Ehrlich, CPSC (June 4, 1975) (available in CPSC File, *supra* note 325) [hereinafter cited as May Progress Report]. The consumer participants found that without their own resources to hire consultants or research and testing experts, they had to accept "on faith" basic technical information that industry participants supplied. Consumer representatives had family and job responsibilities and thus were at a considerable disadvantage in comparison with industry members, who were full-time salaried representatives of their organizations. *1976 Reform Hearings, supra* note 24, at 35-36.

[357] CU, Interim Proposal for a Power Lawn Mower Safety Standard Draft No. 3 (Apr. 17, 1975); CU, Rough Draft Power Lawn Mower Safety Standard (Mar. 1975).

[358] CU distributed 1,000 copies of its third draft, many to participants who submitted written comments. May Progress Report, *supra* note 356, at 1. Consumers generally favored the proposal; industry generally opposed it. *Id.* at 1-2.

[359] The offeror had to prepare supporting materials and compile test data for its standard. 40 Fed. Reg. 30,863 (1975).

[360] Among the documents CU submitted were: Proposed Lawn Mower Safety Standard (July 1975) [hereinafter cited as CU Proposal]; Rationale for Proposed Safety Standard (July 1975); Economic Impact of Proposed Lawn Mower Safety Stan-

2. *The Proposed Standard*

CU's proposed standard addressed all hazards identified in the NOP. To protect against injuries from blade contact, the most frequent cause of injury, CU recommended that mowers either meet a "blade harmless" test or have a "deadman control" that would stop the mower blades whenever the operator left the operating position.[361] The deadman control would disengage the blades from the drive shaft without shutting off the motor so that users would not be inconvenienced by having to restart the mower each time they left the operating position.[362] The standard required that walk-behind mower blades stop within four seconds and riding mower blades stop within five seconds after release of the deadman control.[363] Because this device might annoy users, CU also recommended a backup "interlock system" to discourage attempts to disable the system.[364] CU also proposed that a sticker be placed on mowers that showed a hand with bleeding severed fingers and the warning "Keep Hands and Feet Away While Engine is Running."[365]

To safeguard against blade contact with the user's feet, CU recommended a shield around the blade and a "foot-probe" test to assure its adequacy, as well as other tests to assure that the shield would not interfere with the mower's maneuverability.[366] Riding mowers were to meet certain stability tests[367] and braking requirements.[368] In addition, CU recommended that riding mower blades stop when the mower was put in reverse.[369] CU recommended sound-level requirements to reduce mower noise level and provisions to protect against electrical shock, burns from hot surfaces, gasoline fires, and injuries from thrown objects.[370]

---

dard (July 1975); and Environmental Impact Assessment Report Based on the Proposed Safety Standard for Power Lawn Mowers (July 1975) (available in CPSC File, *supra* note 325). *See* 42 Fed. Reg. 23,052 (1977).

[361] CU Proposal, *supra* note 360, ¶ 1205.12(d); *see* 42 Fed. Reg. 23,052, 23,055 (1977).

[362] CU Proposal, *supra* note 360, ¶ 1205.12(e)(1); *see* OPPE Staff Report, *supra* note 168, at D-34. The recommendation allowed engine shut-off if the mower had a power start as opposed to a manual start, because consumers would be minimally inconvenienced by restarting the mower and thus would have little incentive to disable the system. CU Proposal, *supra* note 360, ¶ 1205.12(e)(1)(ii).

[363] *Id.* ¶ 1205.12(f).

[364] *Id.* ¶ 1205.13(c).

[365] The sticker "sent shivers up and down [the] spine" of the president of Toro Company, a major manufacturer of power mowers, not only because it was chilling to look at but because of the chilling impact it might have on marketing. *A Mower Safety Code with a Sharper Edge,* BUS. WEEK, Aug. 11, 1975, at 17.

[366] CU Proposal, *supra* note 360, ¶ 1205.18(a).

[367] *Id.* ¶ 1205.17.

[368] *Id.* ¶ 1205.15.

[369] *Id.* ¶ 1205.16(a).

[370] *Id.* ¶¶ 1205.4-1205.10. CU had watered down some of its original proposals. For example, it increased the blade-stopping time for walk-behind mowers from two seconds to four seconds. Shroer & Wolz, *Lawn Mower Makers Shortcut Safety,* TRIAL MAGAZINE, Nov. 1980, at 48. However, CU's final proposal contained many provisions from its original draft standard prepared before the process officially began. Papritz

OPEI strongly opposed most provisions in CU's proposal. It wanted no noise limit, because it maintained that noise was not a safety hazard.[371] It objected to the provision that riding mower blades not cut when mowers were operated in reverse,[372] and advocated less stringent requirements to safeguard against fires, shock, and burns.[373] Its major objection, however, was to the recommended deadman control mechanism.[374] It argued that such a system would be unreliable and would require a costly clutch system for gasoline-powered mowers and urged CPSC to adopt a simpler solution that would allow the engine shut-off to stop the blades.[375]

Both CU and industry agreed that the standard would increase costs. They estimated that the added cost in the first year for the average walk-behind mower would be about forty dollars, or thirty-two percent of the mower's cost; for the average riding mower, about one hundred dollars, or eleven percent of the cost.[376] Their overall cost estimates for the first year, however, varied greatly from $270 to $383 million, because of their differing estimates of how many mowers would be manufactured.[377]

CU and industry differed the most over the proposed standard's benefits. CU estimated that its standard would reduce injuries and their related costs by seventy-five percent when all lawn mowers met the standard's requirements;[378] industry estimated a fifty percent reduction in injuries.[379] CU found that the standard's benefits, in terms of reduced injuries, pain and suffering, and other intangibles, were difficult to quantify and roughly estimated that for every dollar the standard saved by preventing injuries, it would cost between $.50 and $4.60.[380] Industry, by comparison, calculated that the standard would

---

Interview, *supra* note 241. CU's project director had taken no votes during the development process, *id.*, and had in the end made the decisions as to the proposed standard's contents, OPPE Staff Report, *supra* note 168, at D-32. The project director received the subcommittees' recommendations (with majority and minority opinions in some cases) and drafted the final standard. *Id.*

[371] OPEI Technical Comments and Recommendations on Proposed Power Lawn Mower Safety Standard Submitted by CU to the CPSC on July 17, 1975, at 16 (Sept. 11, 1975) (available in CPSC File, *supra* note 325) [hereinafter cited as OPEI Technical Comments].

[372] *Id.* at 24-33.

[373] *Id.* at 58-59.

[374] *Id.* at 40-44; *see supra* note 362 and accompanying text.

[375] *Id.* at 43-44; *see A Mower Safety Code with a Sharper Edge,* BUS. WEEK, Aug. 11, 1975, at 18.

[376] Consumers Union, Economic Impact of Proposed Safety Standard 78 (July 1975) (available in CPSC File, *supra* note 325) [hereinafter cited as CU Economic Impact Report].

[377] *Id.* OPEI estimated a 30% drop in sales which meant the standard's cost would be closer to $270 million. Stanford Research Institute, An Economic Analysis of the Consumers Union Proposed Safety Standard for Power Lawn Mowers S-1 (Aug. 1975) [hereinafter cited as SRI Economic Analysis].

[378] CU Economic Impact Report, *supra* note 376, at 60.

[379] SRI Economic Analysis, *supra* note 377, at S-1.

[380] CU found that valuing the loss of a finger, for example, was necessarily subjective. It found it "virtually impossible" to put a dollar value on such intangibles as consumer "peace of mind" arising from the knowledge that mowers are safer to operate. CU Economic Impact Report, *supra* note 376, at 62. CU maintained that it was not necessarily undesirable if the standard's costs exceeded estimated costs associated with lawn mower injuries, because the type of injuries at stake involved a high degree of

cost $2.10 for every dollar saved.[381] On the basis of these estimates, the President's Council on Wage and Price Stability urged the Commission to reject CU's proposal.[382]

Thus, the proposed standard that CU presented to the CPSC on July 17, 1975, was highly controversial. Industry claimed that CU had used its data, expertise, and money to develop the standard but had not taken its advice or listened to its views.[383] It therefore attempted to influence the CPSC during the next stage of the development process.

D. CPSC Evaluation of Proposed Standard

This stage of the process turned out to be the longest — consuming nearly two years, or more than twice the time CU took to develop its proposal.[384]

The CPSC staff conducted a preliminary evaluation of CU's proposal.[385] It found that CU had addressed all the hazards listed in the NOP, but that the proposed standard was so lengthy and complex that it needed more than its allotted sixty days to fully evaluate the proposal.[386] The Commission, therefore, extended the evaluation period for five months until February 15, 1976.[387]

The extension was necessary to allow the Commission to perform the technical evaluation of the proposal, which included the following components: engineering analyses of the proposed requirements' adequacy for reducing hazards; evaluation of the proposed test procedures' precision and repeatability; and development of alternatives where the proposed standard was found inadequate.[388] Given the proposal's broad scope and complexity, the Commission expected the technical evaluation to take several months.

---

pain and suffering and consumers might well be willing to pay a premium to reduce the risks of such injuries. *Id.* at 63.

[381] SRI Economic Analysis, *supra* note 377, at S-1.

[382] Proposed Lawn Mower Safety Standard, Comments of the Council on Wage and Price Stability 4 (Oct. 14, 1975) (available in CPSC File, *supra* note 325). The Council urged the CPSC to do further work to develop more reliable estimates. *Id.* at 22-23.

[383] *A Mower Safety Code with a Sharper Edge,* BUS. WEEK, Aug. 11, 1975, at 17.

[384] CU had taken nine and one-half months to develop its standard — from September 29, 1974 to July 17, 1975. *See supra* text accompanying note 216.

[385] Briefing Paper, Preliminary Evaluation of Recommended Standard on Power Lawn Equipment (Sept. 4, 1975) (available in CPSC File, *supra* note 325).

[386] *Id.* at 2.

[387] Minutes from CPSC Executive Session, Sept. 11, 1975 (available in CPSC File, *supra* note 325). By the time the Commission received CU's proposal, it had already twice extended its own period for evaluating the proposal. *See* 40 Fed. Reg. 10,228 (1975). When the Commission granted CU's six-month extension, from December 19, 1974 to June 19, 1975, it granted itself a six-month extension to evaluate the proposal. *Id.* Subsequently it granted CU and itself an additional month, which gave CU until July 1974 to submit a proposal and the Commission until September 15, 1975 to publish a proposed standard. 40 Fed. Reg. 30,863 (1975).

[388] 40 Fed. Reg. 45,220 (1975).

As the technical work progressed, the Commission staff held several meetings to receive comments on CU's proposal. The staff met with OPEI in three public meetings in September and October.[389] The staff also met with consumers and inventors and visited a mower engine manufacturer.[390] In addition, the staff convened three "consumer sounding boards" around the country.[391] In the meantime, the Commission was receiving numerous written comments on the proposal.[392] Because the standard was still in the formative stage, many of the participants in the offeror stage now wanted to present their views to the Commission. In short, the Commission's evaluation stage from the outset involved considerable public participation. It was not just a period of technical assessment of the offeror's proposal.

In February, the Commission extended its evaluation period to June 30, 1976.[393] By then, the staff had conducted a more thorough evaluation of CU's proposal and the Commission needed to make preliminary decisions as to which provisions of the proposed standard to adopt, reject, or modify.[394] In late April, the Commission provided the staff with general policy guidelines on several important areas of controversy. The Commission decided that it should reject the safety back-up system, or interlock system, which CU had recommended unless it would add almost no cost to the price of a mower.[395] It also decided that the standard should not contain a noise level requirement[396] and that it should reject CU's proposed thrown-objects test, which did not simulate actual mowing conditions, and develop a new test.[397] It also concluded that the blade-stopping time should relate closely to actual operator reaction, even if it meant significant redesign of current mower engines.[398]

The Commission also considered modifying the standard to overcome technical problems in the proposed braking and acceleration performance tests and stability requirements.[399] Staff suggested that the standard be narrowed to cover only blade contact and thrown objects, which accounted for over eighty-five percent of mower-related hazards.[400] The Commission took no action, however, to limit the standard's scope.

---

[389] *See* Logs of Meetings, Sept. 11, 1975, Sept. 18, 1975, Oct. 16, 1975 (available in CPSC File, *supra* note 325).

[390] *See* Transcript of CPSC Meeting, Nov. 20, 1975, (available in CPSC File, *supra* note 325).

[391] Memo from Alan M. Ehrlich, Technical Analysis Division (TAS), CPSC, to Charles R. Casper, Director, TAS, CPSC (Apr. 30, 1976). The Commission created the consumer sounding boards during Richard O. Simpson's chairmanship to provide advice and feedback on specific issues. *See 1976 House Reform Hearings, supra* note 24, at 9 (testimony of Richard O. Simpson, CPSC Chairman).

[392] Comments were filed by, among many others, the President's Council on Wage and Price Stability, Proposed Lawn Mower Standard, Comments of the Council on Wage and Price Stability (Aug. 14, 1975), and OPEI, which, in addition to many technical comments, submitted an economic analysis prepared by Stanford Research Institute. SRI Economic Analysis, *supra* note 377.

[393] 41 Fed. Reg. 9914 (1976).

[394] *Id.*

[395] OPPE Staff Report, *supra* note 168, at D-37.

[396] The Commission decided that the standard should contain noise requirements for riding mowers only if a need and justification existed. *Id.* at D-38. As a practical matter, this meant no noise requirements.

[397] *Id.*

[398] *Id.* at D-37.

[399] *Id.* at D-39. Some of these proposed tests involved new test concepts and, according to the Bureau of Engineering Standards, many of them either could not be

In early July, the Commission extended the evaluation phase for the last time. It gave itself until April 30, 1977, ten more months, to publish the proposed standard.[401] It needed the extra time to develop a thrown-objects test, rewrite the standard for technical clarity, and prepare an economic impact analysis.[402] The staff prepared several drafts of the standard, which OPEI and others commented upon, before it delivered a final draft and briefing package to the Commission in March.[403] OPEI also commented on the briefing package.[404]

On May 5, 1977, the Commission published its proposed rule.[405] The rule was very broad, covering blade contact, thrown objects, fuel and electrical hazards, and riding mowers. It did not include, however, many of CU's proposals, most notably the interlock system, the noise level requirements,[406] and the warning label, which the Commission found objectionable because of its "gory nature."[407] In addition, the Commission's proposal contained a different thrown-objects test[408] and allowed a longer blade-stopping time as well as a longer phase-in period.[409] The Commission rejected CU's recommended "foot probe" in favor of one it found more effective to prevent blade contact,[410] and

---

performed safely or measured the tester's skill rather than product safety. These were among the "most complex and incomplete group of requirements" in CU's standard. *Id.*

[400] *Id.*

[401] 41 Fed. Reg. 27,997 (1976).

[402] *Id.* The Commission also had to consider, *inter alia,* whether the blade-stopping requirement should be phased in and whether sufficient risks existed to warrant some provisions. *Id.*

[403] Briefing Package on Draft Proposed Standard Power on Lawn Mowers 1 (Mar. 10, 1977) (available in CPSC File, *supra* note 325).

[404] Letter from Dennis C. Dix, Director of OPEI, to the Commission (Apr. 15, 1977) (available in CPSC File, *supra* note 325).

[405] 42 Fed. Reg. 23,052 (1977).

[406] The Commission considered it difficult and expensive to design an interlock system that would prevent the disabling of the deadman control, *id.* at 23,055, and decided to defer rulemaking on noise to the Environmental Protection Agency, which had authority to regulate in this area under the Noise Control Act of 1972, *id.* at 23,058-59.

[407] *Id.* at 23,059.

[408] The CPSC's proposed thrown-objects test, which was developed by Research Triangle Institute, differed not only from CU's test but other widely known tests as well. *Id.* at 23,054-55.

[409] The Commission proposed that the standard take effect two years after it was issued. At that time, walk-behind mowers would be required to meet a blade-stopping time of five seconds and riding mowers a blade-stopping time of six seconds. Two years later (four years after issuance of the standard), both types of mowers would have to meet a blade-stopping time of three seconds. *Id.* at 23,054. CU's proposal is discussed *supra* at notes 360-70 and accompanying text.

[410] 42 Fed. Reg. 23,052, 23,054, 23,063-64. The CPSC did adopt a foot-probe test similar to CU's, however. *Id.* at 23,063-64.

supplemented the handle-strength test with one of its own.[411] Contrary to CU's proposal, the Commission's proposed standard allowed the mower engine to stop with the release of the deadman control, even for mowers requiring manual restart, as long as the manual start passed an "easy restart test" which CPSC had developed.[412] The Commission rejected CU's proposal for a "blade harmless" test as an alternative to the deadman control.[413] The Commission had found the CU test unsound but could not find a repeatable test to replace it.[414] The Commission made a host of other less noteworthy changes in CU's proposal. It rejected some tests on technical grounds,[415] and eliminated other requirements because the risk was not sufficient to support the requirement or because voluntary standards sufficiently addressed the risk.[416] In the end, the Commission's proposed standard deviated so significantly from CU's original proposal that CU filed formal comments on the new proposal and was partially reimbursed by the CPSC for the costs of doing so.[417]

The lengthy CPSC evaluation had involved two stages — an initial in-depth review of the offeror's proposal and the subsequent development of numerous new or different requirements. Both stages had taken more time than expected, due to the number, complexity, and controversial nature of the standard's requirements. Developing new provisions for the proposed standard especially added to the time required because the Commission staff had to repeat the offeror's tasks of analyzing injury data, developing adequate tests, and considering cost effectiveness. The Commission, though not statutorily required to involve the public in this stage of the process, as was the offeror, nevertheless allowed and solicited substantial public participation throughout the evaluation phase.[418]

The evaluation phase was lengthy in other standard-setting projects as well, for in each case the Commission found it necessary to substantially revise the offerors' proposals.[419] These projects also had been too broadly defined at the outset, and often included risks for which there was too little injury data and for which solutions were not readily available.[420] These problems had come home to roost in the evaluation phase.

---

[411] *Id.* at 23,054, 23,065-66.

[412] *Id.* at 23,055, 23,067-68. The Commission was not convinced that its easy-restart test would adequately discourage users from disabling the deadman control and therefore indicated a special interest in receiving comments addressed to this test. *Id.* at 23,067-68.

[413] *Id.* at 23,056.

[414] The Commission asked the public to suggest tests that would measure whether a moving blade was harmless, for it considered the development of a safer blade one of the most effective means of reducing blade-contact injuries. *Id.*

[415] *Id.* at 23,058.

[416] *Id.* at 23,058-59.

[417] *See* Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health,* 56 TEX. L. REV. 1329, 1409 n.268 (1978); *infra* text accompanying note 422.

[418] *See supra* notes 389-92 and accompanying text.

[419] *See generally* 41 Fed. Reg. 2742, 2744-47 (1976) (CPSC's proposed swimming pool slide standard, reflecting changes in the offeror's proposed warning signs and rejection of proposed requirement that slides be installed only where water is more than four feet deep); 41 Fed. Reg. 6178, 6178-87 (1976) (CPSC's proposed architectural glass rule, with explanation as to how it differed from the offeror's proposal); 41 Fed. Reg. 14,112, 14,117-20 (1976) (CPSC's proposed matchbook standard, reflecting additional provisions and rejection of offeror's educational safety message requirement).

E. *Final Stage of Standard Setting*

The CPSC's initial publication of the proposed lawn mower standard inspired 110 commentators to submit their views.[421] The written views included critical comment from CU,[422] which had been awarded $10,970 to review the Commission's proposal. The Commission also held one day of hearings on the proposal,[423] which attracted about eighteen witnesses, most of whom were business representatives.

Written comments were originally to have been filed by July 5, 1977, but the Commission extended the deadline for comments to August 12, and gave those who had commented by that date until September 6 to file additional comments in response to comments already filed.[424] This additional opportunity for comment produced seven more comments.[425]

By mid-September, the Commission staff had identified some 700 issues raised by the comments that it needed to address.[426] About half were of a technical nature that required attention by the CPSC's Directorate of Engineering Science.[427] The staff asked the Commission for an eight-month extension in order to consider the comments and prepare a final standard.[428] The Commission extended the final rule deadline from October 2, 1977 to June 3, 1978.[429]

In the course of evaluating the comments, it became clear that the project had become unmanageable. On March 7, 1978, the staff recommended that the Commission address the blade-contact hazard separately from the other hazards, because a standard addressing this hazard alone could be issued in a reasonable time.[430] The staff had concluded that it was too difficult to continue to address the broad spectrum of injuries: the thrown-objects portion of the standard presented difficult technical problems; riding mowers posed different problems than walk-behind mowers and could be handled more appropriately in a separate standard;[431] and fuel ignition, hot surfaces, and electric hazards did not cause significant risks and should not be addressed at all.[432] The Commission agreed and on March 30 directed the staff to work on the blade-contact hazards, which caused about sixty-four percent of all mower injuries, with the aim of producing a final rule by the end of 1978.[433]

---

[420] *See supra* notes 229-31.

[421] 42 Fed. Reg. 34,892 (1977).

[422] *Id.*

[423] *Id.*

[424] *Id.*

[425] Memo from Bert Simson, Director, Office of Program Management (OPM), CPSC, and William Kitzes, Program Manager, OPM, CPSC, to Michael Brown, Executive Director, CPSC, Interim Schedule — Power Lawn Mower Standard 1 (Sept. 20, 1977) (available in CPSC File, *supra* note 325).

[426] *Id.*

[427] *Id.*

[428] *Id.*

[429] 42 Fed. Reg. 54,573 (1977).

[430] Memo from William Kitzes, OPM, CPSC, to the Commission, Status of Power Mower Standard (Mar. 7, 1978) (available in CPSC File, *supra* note 325).

But even narrowing the rule so that it would address a single hazard did not bring the proceeding to a speedy conclusion. The Commission had received a large number of comments on its proposed requirement that the mower blades stop, without stopping the engine, within a specified time after the operator left the operating position.[434] Several comments addressed the reliability and safety of "brake-clutch" mechanisms, which could meet this requirement. Mower manufacturers thought that the mechanism was unreliable and thus could increase safety hazards; brake-clutch mechanism manufacturers, however, argued they were both reliable and safe.[435] Given the diversity of views and importance of the issues, and because some of the test data the Commission had obtained had not been made available for comment, the Commission published a notice on November 2, 1978, seeking views on the mechanism's reliability and safety.[436] It allowed only a twenty-day comment period but sent advance notices to those who had previously commented on the subject.[437] Industry members petitioned the Commission to extend the period, and the Commission gave them until December 15, 1978, to comment.[438] At the same time it granted their request for an oral hearing, which was held December 11.[439]

Following a series of open Commission meetings in January and February to consider a proposed final standard, the Commission issued the final standard on February 15, 1979,[440] about five and one-half years after OPEI's petition to initiate the development of a safety standard and four and one-half years after the development process had begun with the publication of the NOP.[441]

The CPSC's final rule differed markedly from its proposed rule. As noted earlier, the Commission had decided to narrow the standard to address only blade-contact injury and to exclude riding mowers from its coverage.[442] But even the earlier blade-contact provisions were changed in the final standard as a result of comments and further study in the final stage of the proceedings.

---

[431] Briefing Package on Recommended Final Power Mower Standard 2-3 (Jan. 9, 1979) (available in CPSC File, *supra* note 325).

[432] *Id.*

[433] *See* 43 Fed. Reg. 24,697 (1978).

[434] 43 Fed. Reg. 51,038, 51,039 (1978).

[435] Various manufacturers had tested the mechanism with different results. The General Services Administration had also performed tests and reported no clutch failure. *Id.*

[436] 43 Fed. Reg. 51,038 (1978).

[437] *Id.*

[438] 43 Fed. Reg. 55,771 (1978).

[439] *Id.* at 55,772.

[440] 44 Fed. Reg. 9989 (1979).

[441] *See supra* note 316 and accompanying text.

[442] *See supra* notes 430-31 and accompanying text.

The Commission retained, but significantly modified, the requirement that the mower blade stop whenever the operator left the operating position.[443] It eliminated the five-second interim stopping-time requirement in favor of a single three-second requirement with an effective date of December 31, 1981.[444] This gave manufacturers thirty-four months in which to meet the requirement — a shorter time period than that in the original proposal.[445] The final standard allowed manufacturers to choose engine shut-off to meet the blade-stopping requirement but only if the mower had a power restart.[446] The Commission prohibited engine shut-off for manual-restart mowers, and rejected the proposed exception for mowers that could meet an "easy restart" test.[447] It had concluded, on the basis of consumer comments, in-depth investigations of mower injuries, and the national experience with automobile seatbelt interlocks, that power mower users would disable any system that required manual restart each time they left the operating position to perform such common tasks as picking debris from the path of the mower.[448] The Commission also had found that the controversial brake-clutch systems, which provided the only other available means of meeting the blade-stopping requirement, were safe and reliable.[449]

The final standard also narrowed the requirement that mowers meet a foot-probe test designed to address blade-contact injuries to the user's feet.[450] The earlier proposal had required the probe to be inserted at all points around the mower's periphery,[451] but the final standard limited the test to the mower's rear area.[452] The blade-stopping requirement would prevent injuries that might occur at other parts of the mower.[453] The final standard retained the foot-probe test procedure that CU originally recommended.[454] The Commission also retained its proposed obstruction test that would assure that the protective shields used to meet the foot-probe test would neither lift excessively during normal use, thereby exposing the blade, nor stop the mower, thus inconveniencing users.[455] The standard also retained a shield-strength test designed to assure that protective shields remained attached and retained their structural integrity in normal use.[456]

---

[443] 16 C.F.R. § 1205.5(a) (1982); *see also* 44 Fed. Reg. 9,989, 10,005 (1979) (discussing the rationale for this requirement).

[444] 44 Fed. Reg. 9,989, 10,024 (1979) (amended at 45 Fed. Reg. 86,417 (1980) to extend the effective date to June 30, 1982, as Congress had mandated in the agency's 1980 appropriations bill; *see supra* note 239) (codified at 16 C.F.R. § 1205.2 (1982)).

[445] The original four-year period is discussed *supra* note 409.

[446] 16 C.F.R. § 1205.5(a)(iv) (1981) (amended by 16 C.F.R. § 1205.5(a)(1)(iv) (1982) to permit engine shut-off as a means of stopping the blade as required by the Consumer Product Safety Amendments of 1981, Pub. L. No. 97-35 § 1212, 95 Stat. 703, 724).

[447] 44 Fed. Reg. 9,989, 10,010 (1979); *see also supra* note 412 (early concern that consumers would disable such a system).

[448] 44 Fed. Reg. 9,989, 10,009-10 (1979).

[449] *Id.* at 10,011-18.

[450] 16 C.F.R. § 1205.4 (1982).

[451] 42 Fed. Reg. 23,052, 23,052-64 (1977).

[452] 16 C.F.R. § 1205.4(b)(ii) (1982). Commission analysis of the reported cases of foot injuries revealed that they had occurred only at the back area of power mowers. 44 Fed. Reg. 9989, 10,002 (1979). One wonders why this basic factual finding came so late in the process.

[453] 44 Fed. Reg. 9989, 10,002 (1972).

The Commission strengthened its proposed warning label, which had featured a hand with a red diagonal line across it,[457] by substituting a label which showed a bladelike object cutting into the five fingers of the hand.[458] The Commission believed that the new label would be "more graphic and potentially more effective" than its earlier proposal, although it again rejected depicting blood dripping from the injured hand.[459]

The Commission estimated that the final standard would raise the cost of the average walk-behind mower by about thirty-five dollars, or a twenty-four percent increase in mower prices for consumers.[460] Its cost-benefit analysis produced the conclusion that for every $4.40 in additional costs per mower, the standard would save about $5.30 in injury costs (exclusive of pain and suffering costs).[461] Industry cost figures were similar to CPSC's, but its benefits estimates were considerably lower.[462] The Commission rejected the notion that its decision to issue the standard should rest on a quantified cost-benefit analysis, concluding instead that its ultimate decision should rest on "judgments based on values rather than numerical weights."[463]

F. Judicial Review

OPEI and an individual consumer petitioned a federal court of appeals for review of the final standard.[464] OPEI claimed, *inter alia,* that the label, foot-probe, shield, and three-second blade-stopping requirements were not supported by substantial evidence as required by the statute.[465] It argued that the blade-stopping requirement was improperly design restrictive[466] and that the brake-clutch mechanism to meet this requirement was unreliable and unsafe.[467] It also alleged that the standard's effective date should be postponed because reliable brake-clutch mechanisms had yet to be developed before manufacturers could meet the standard.[468] Finally, OPEI claimed that the Commission had failed to demonstrate that the standard's benefits bore a reasonable relationship to its costs and thus had not shown that the standard was "reasonably necessary" and "in the public interest."[469] The consumer petitioner, on the other hand, claimed that the blade-stopping time was too long[470] and that the CPSC should have chosen an earlier effective date for this requirement.[471]

---

[454] 16 C.F.R. § 1205.4(a)(1), (b)(1) (1982). It was one of the few portions of CU's original standard that the Commission retained.

[455] *Id.* § 1205.4(b)(2). The Commission dropped the "terrace test," which protected against injuries when the mower moved from a flat surface to an incline. Again, injury data did not support a need for the test. 44 Fed. Reg. 9989, 10,003 (1979).

[456] 16 C.F.R. § 1205.4(a)(2) (1982).

[457] 42 Fed. Reg. 23,052, 23,063 (1977).

[458] 16 C.F.R. § 1205.6 (1982).

[459] 44 Fed. Reg. 9,989, 10,019 (1979).

[460] *Id.* at 10,021.

[461] *Id.*

[462] Industry estimated benefits of $.70 for every $4.40 in added costs. Southland Mower Co. v. CPSC, 619 F.2d 499, 523-24 (5th Cir. 1980).

[463] 44 Fed. Reg. 9,989, 10,021 (1979).

[464] Southland Mower Co. v. CPSC, 619 F.2d 499 (5th Cir. 1980).

[465] *Id.* at 504; *see supra* notes 201-04 and accompanying text.

[466] OPEI based this claim on the statutory requirement that standards "whenever feasible, be expressed in terms of performance requirements." 15 U.S.C. § 2056(a) (1976) (amended 1981); *see also supra* note 200 and accompanying text (discussion of types of standards originally permitted by the CPSA).

With one minor exception, the court upheld the Commission's final standard.[472] It found substantial evidence in the record to support the blade-stopping, foot-probe, and labeling requirements as well as the December 31, 1981, effective date for the blade-stopping requirement.[473] It further found that the blade-stopping provision was not design restrictive but in fact was a performance standard,[474] and concluded that the Commission's economic analysis had reliably shown that the standard's benefits bore a reasonable relationship to its costs.[475]

G. *Congressional Review*

Although the power mower rule withstood judicial review, it did not fare as well on Capitol Hill. In 1980, Congress postponed the standard's effective date by six months to June 30, 1982;[476] and in 1981, directed the Commission to amend the standard to allow the deadman control mechanism to stop the mower engine as a means of stopping the blades.[477] Industry had urged this proposal without success throughout the standard development process.[478] Thus "without a hearing, without a record, [and] without cost benefit analysis" Congress undid an important provision of a standard which had been based on nearly five years of work.[479] It was, simply put, a case of effective special interest lobbying.[480] Its long-term effect, no doubt, will be to assure one more step — an appeal to Congress — in every standard-setting procedure.

---

[467] *Id.* at 518. Industry had persisted in this claim throughout the administrative proceedings. *See supra* notes 375, 435-36 and accompanying text.

[468] 619 F.2d at 519.

[469] *Id.* at 504.

[470] *Id.* at 515. Petitioner John Hayward, who participated throughout the agency proceedings, asserted that a two-second or shorter time was reasonable. *Id.*

[471] Petitioner Hayward urged an effective date of December 31, 1980, a year earlier than that required by the CPSC. *Id.* at 526.

[472] The court found that there was insufficient injury data to justify application of the foot-probe test to the discharge chute area of lawn mowers. *Id.* at 510.

[473] *Id.* at 526. The court "respected" the CPSC's judgment on the standard's effective date. It found that the agency's findings concerning the date's impact on industry were "well founded" and that the agency had appropriately balanced safety concerns with economic impact on the industry in reaching its decision. *Id.*

[474] *Id.* at 515. The court found that although only a limited number of designs were available to meet the blade-stopping time, the standard did not foreclose the development of new technology to meet its requirements. The standard itself permitted two existing approaches — the brake-clutch mechanism (of which there were alternative designs) and the engine-kill system with power restart. It was therefore a performance requirement and not design limited, as OPEI maintained. *Id.*

[475] *Id.* at 525-26.

[476] Department of Housing and Urban Development — Independent Agencies Appropriations Act, Pub. L. No. 96-526, 94 Stat. 3044, 3050 (1980).

H. Petition for Delay

In March 1982, Toro Company petitioned the Commission to extend the effective date of the power mower standard for one year, until June 30, 1983.[481] Numerous comments were filed concerning the petition and the Commision held a hearing to receive oral comments.[482] Some industry members claimed they would suffer serious economic hardships if they had to meet the requirements by June 30, 1982.[483] They also pointed to the industry's generally poor economic condition caused by the nation's depressed economy.[484] A number of manufacturers, however, had already met the final safety standard[485] and to extend its effective date would have put them at a competitive disadvantage and penalized them for their compliance. The Commission staff reported that 13,000 to 29,000 additional mower-related injuries would occur if the Commission delayed the standard one year.[486] In May 1982, the Commission unanimously voted to deny the petition.[487]

I. Reflections on the Process

For many reasons the process to develop and issue the lawn mower standard was surprisingly lengthy and difficult. Some of the causes for the difficulties were within the Commission's power to correct in subsequent standard-setting projects. For example, it could have narrowed the project's scope to cover only the most serious hazards for which feasible solutions existed, and it could have given offerors more guidance during the process. Unfortunately, most of the offeror proceedings started within a short time of one another,[488] and therefore the Commission did not learn of its mistakes in one project in time to avoid them in another.

---

[477] Consumer Product Safety Amendments of 1981, Pub. L. No. 97-35, § 1616(a), 95 Stat. 703, 724.

[478] *See supra* notes 375, 434-35 and accompanying text.

[479] Pittle, *Hill Panel Mows Down Safety Rule,* Washington Star, May 21, 1981, at A19, col. 1 (editorial comment by Comm'r R. David Pittle).

[480] Industry's lobbying for an outright revocation of the power-mower rule, however, was rejected in favor of modifying it to meet industry's major objections. *Id.*

[481] Petition Log, *supra* note 104, at C-24.

[482] Meeting Notice, 47 Fed. Reg. 17,827 (1982).

[483] 9 PROD. SAFETY & LIAB. REP. (BNA) 307 (1982).

[484] *Id.* Toro claimed it could meet the deadline but would prefer additional time to prepare for the economic impact. *Id.*

[485] Papritz Interview, *supra* note 241.

[486] 9 PROD. SAFETY & LIAB. REP. (BNA) 307 (1982).

[487] *Id.*

[488] The first four offeror proceedings were begun within a five-month period. *See* OPPE Staff Report, *supra* note 168, at D-5, D-12, D-20, D-30.

Other factors contributing to the difficulties were inherent in the statutory scheme. The two-stage standard-setting process involving the use of the outside groups necessarily complicated and lengthened the process, as did the extensive public participation requirements from the earliest development stage to the final rulemaking stage.[489] The statutory requirements that "substantial evidence" support the final rule[490] and that the Commission express the standard in terms of performance requirements "whenever feasible" also added to the job's difficulty.[491]

Still other factors contributing to the difficulties were project specific. Power lawn mowers were complex products, and throughout the process participants disagreed over the technical feasibility of proposed requirements. The proposed solution's high cost also occasioned persistent and strong opposition. There was virtually no chance that the consumer-oriented offerer and the power mower industry would agree on a proposed standard, as they were poles apart on fundamental issues. The Commission therefore had to find the appropriate solution. Given the diversity of views and the project's complexity this was not an easy task and consumed the greatest portion of time required for the project. Since it normally takes a private standards-writing organization several years to complete a voluntary standard,[492] the Commission's completion of the lawn mower standard in less than five years, given all the difficulties mentioned above, does not seem so unreasonable.

---

[489] Offerors often failed to provide the technical rationale or documentation to meet the "substantial evidence" test, thereby making it necessary for the Commission to engage in substantial testing of the offeror's proposals. In addition, the Commission had to redraft proposals to comply with the statutory preference for performance standards. *See supra* note 419 and accompanying text.

[490] 15 U.S.C. § 2060(c) (1976).

[491] *Id.* § 2056(a) (amended 1981).

[492] Spencer Interview, *supra* note 250.